

91-338
No.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1991

**JESSE J. SANCHEZ, VICTOR TORRES
and ROBERT CARO,**

Petitioners,

vs.

CITY OF SANTA ANA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether certiorari should be granted because the Ninth Circuit is at odds with other circuits in permitting a municipal police department to require exhaustion of the internal chain of command as a precondition to exercising rights under Title VII and the First Amendment to complain of workplace discrimination to the employer's Affirmative Action Officer?

II. Whether certiorari should be granted to determine the scope of the injuries remediable under 42 U.S.C. sec.1985(2) based on a conspiracy to obstruct justice in state court and to intimidate and penalize parties and witnesses in federal court?

A. Whether Certiorari Should Be Granted to Determine Whether 42 U.S.C. Section 1985(5) Provides a Remedy for

Injuries Caused by Acts in Furtherance of a Conspiracy to Obstruct Justice in State Court or to Intimidate or Punish Parties or Witnesses in Federal Court, other than Injuries to the Underlying State or Federal Action?

B. Whether 42 U.S.C. sec.1985(2) Provides a Remedy for Injuries Caused by a Conspiracy to Obstruct Justice in a State Court When the Acts in Furtherance of the Conspiracy Cause a Final Judgment that Would Otherwise Have Claim and Issue Preclusive Effect?

III. Whether certiorari should be granted to determine whether the equal protection clause of the Fourteenth Amendment and 42 U.S.C. sec.1983 provide a remedy for a claim of a racially discriminatory workplace environment in public employment?

ADDITIONAL NAMED RESPONDENTS

The following individual defendants were also named defendeants and are respondents herein: Raymond C. Davis, Chief of Police; Personnel Director Donald Bott; Captain E. B. Hansen; Captain Robert Stebbins; Lt. Michael Lewellen; Lt. Oliver Lee Drummond; Lt. Dale Sterzer; Lt. Norwood Williams; Lt. Lawrence Pitzer; Sgt. Gary Dixon; Sgt. John Collins; Sgt. William Bruns; Sgt. John Collins; Sgt. Richard Faust; Sgt. James McDaniels; Sgt. Michael Lanners; and Sgt. John Dittus.



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**OFFICIAL AND UNOFFICIAL
REPORTS OF OPINION HEREIN**

The opinion below appears as follows in the official reports of the United States Court of Appeal: Sanchez v. City of Santa Ana, ____ F.2d ____ (9th Cir. 1991). [Appendix H].

JURISDICTIONAL STATEMENT

Pursuant to 28 U.S.C. sec.1254 and United States Supreme Court Rule 10.1(a) & (c) this Court has jurisdiction to consider this petition for writ of certiorari to review the decision of the Court of Appeal for the Ninth Circuit. The Ninth Circuit entered judgment on July 11, 1990 [Appendix F], modified on February 27, 1991 [Appendix G], and modified again on May 24, 1991 [Appendix H]. Timely petitions for rehearing to the Ninth Circuit were filed, with the last one denied on May 24, 1991 with an order staying the mandate for 90

days to permit the preparation and filing of this petition.

STATEMENT OF THE CASE

This action involves substantial claims of flagrant employment discrimination in promotions and a discriminatory workplace atmosphere in the Santa Ana Police Department [SAPD]. There was substantial evidence of pervasive and uncorrected racial and ethnic slurs and jokes, significantly aggravated by racial tensions deliberately caused by police management to thwart a personnel department plan to correct discrimination in the promotional process.

It was undisputed by defendants that they were enforcing a "chain-of-command" policy, prohibiting petitioners from presenting valid complaints of discrimination to the City's affirmative action officer [AAO] whose City and

federally mandated duty was to receive and investigate such complaints. There was also substantial evidence that high-ranking officials in the SAPD retaliated against petitioners because of other First Amendment protected activities, enforcing a "code of silence"; and that under the guise of the "chain-of-command" policy, defendants conspired to frustrate and punish petitioners and other officers who dared complain of discrimination through other official channels, including federal courts; intimidating and punishing others who might provide support to those complaints; and obstructing justice in state and administrative tribunals. And there was substantial evidence of pervasive use of racial slurs and jokes in duty situations, severe racial tensions associated with the influx of new minority hirings and problems with the promotional

process, and widespread peer ostracism of minority officers who complained of race problems.

This case then presents three distinct areas in which this Court should issue a writ of certiorari. There is a conflict among the circuits, and an important legal issue, on whether a public employer may require an employee to route his complaints of discrimination through his chain-of-command rather than to the employer's affirmative action officer, who is empowered by law to receive such complaints.

There are important legal issues concerning the scope of 42 U.S.C. sec.1985(2), involving conspiracies to obstruct justice in state courts and to impede access to federal courts. The Ninth Circuit has adopted a rule which directly conflicts with the statute, barring

remedies for any injuries other than damage to an underlying cause of action, and barring injured witnesses from asserting a claim. The Ninth Circuit has adopted a second rule applying preclusion principles from a state court judgment, even if obtained as a direct product of an unlawful conspiracy to obstruct justice under sec.1985(2), - the very evil which the Congress sought to remedy in that section.

There is an important legal issue concerning whether a racially discriminatory workplace environment occurring in public employment deprives any right secured by the equal protection clause. The Ninth Circuit has applied this Court's Patterson holding to public employers, even though that decision only addressed 42 U.S.C. sec.1981 and its contract formation claims against a private employer, and even though it would seem to

have no bearing on an equal protection claim.

A. Pretrial Pleadings and Rulings

Jesse J. Sanchez, Victor Torres and Robert Caro, petitioners-appellees-plaintiffs, are Mexican American police officers who were hired in 1975-77 in response to a Title VII lawsuit filed against the [SAPD]¹. They and nearly 100 other Hispanic officers were hired as "lateral transfers" -- i.e. they were experienced peace officers hired en masse from other departments. This petition concerns claims by these police officers in United States District Court under 42 U.S.C. secs.1981, 1983, 1985, 1986 and 2000e [Title VII] that their constitutional rights under the First and Fourteenth

¹. See League of United Latin American Citizens [LULAC] v. City of Santa Ana, 410 F.Supp. 873 (C.D. Cal. 1976).

Amendment were deprived, including alleged massive and pervasive unlawful retaliation for protected speech seeking to redress department-wide employment discrimination.

On May 20, 1979, petitioners filed an action against respondents-appellees-defendants City of Santa Ana et al. Partial summary Judgment was granted in favor of defendants as to all of Caro's pretermination claims on grounds of claim and issue preclusion from a prior state proceeding [Appendices I-L]. Partial summary judgment was granted in favor of petitioner Sanchez on his due process claim².

A Joint Pre-Trial Order was entered on

². This summary judgment, and the damages verdicts awarded thereon, are the subject of a separate opinion herein, reported at 915 F.2d 424 (9th Cir. 1990) [Appendix D]. A Petition and Cross-Petition for Certiorari is pending in this Court from that opinion as well. [Docket No. 90-1979].

March 22, 1982 and an Amended Order on July 17, 1984. All remaining claims of retaliation, conspiracy, and a racially discriminatory atmosphere were expressly preserved under Title VII and secs.1981, 1983, 1985 & 1986, and expressly tried under all those sections. Petitioner Caro litigated post-termination claims under sec.1985(2) for obstruction of justice and witness intimidation, in the state and federal courts, along with Petitioners Sanchez and Torres.

B. Evidence Adduced at Trial

1. Discriminatory Workplace Environment

From 1975-77, petitioners and other officers periodically complained to supervisors at all levels concerning the prevalence of racial slurs and jokes in duty situations, directed at both fellow officers and members of the public. No

official action was taken and the widespread practice continued. In December 1977, multiple copies of a racially offensive cartoon -- the "Santa Coon" Cartoon -- were circulated in roll call and posted on the walls for four days. No corrective action was taken by any supervisor.

Senior personnel officials testified that in 1977, 1/3 of the SAPD were Hispanic officers, most with college degrees and many with prior supervisory experience, while none of the 42 sergeants were Hispanic³. In December 1977, at an official meeting of nearly the entire department with defendant Chief of Police Raymond C. Davis and senior personnel officials, several Hispanic officers spoke in varying degrees of favor of a City

³. 1 of 17 lieutenants, and 0 of 4 captains were Hispanic.

Personnel Department plan to redress this problem.

According to senior personnel officials, Chief Davis intentionally incited the Anglo officers against the plan by misrepresenting it, giving a distorted interpretation of the law, and encouraging resistance. Anglo officers responded then and in succeeding months with virulent and racist comments against Hispanic officers, in front of Chief Davis and numerous senior officers, and no action was taken.

In January 1978, petitioners and 13 other officers formed a local chapter of the statewide organization, the Latino Peace Officers Association [LPOA]. The LPOA then submitted a written complaint via the chain-of-command, signed by the 16 officers, alleging the continuing prevalence of racial slurs and jokes in duty situations, and the recent aggravation

of the condition and racial tensions caused by the sergeants' examination and the SAPD's formal and informal responses to it.

An official investigation was conducted of the LPOA grievance from January-March 1978, resulting in no official corrective action and a finding that the complainants were unduly sensitive, and that there was at worst misplaced humor. The LPOA complainants were subjected to widespread peer ostracism and hostility.

2. Sanchez' Discrimination
Complaint to AAO

After four (4) days and no corrective action by any supervisor, including his own, petitioner Sanchez took the "Santa Coon" Cartoon to the City's AAO Paul Garza, who directed it to the police chief within 24 hours. An investigation was conducted, which resulted in suspensions for the

officers involved and reprimands for the supervisors who tolerated it. Sanchez received an official, written reprimand for taking it outside of the chain-of-command. The reprimand included a warning of more serious punishment for any further "violations," and it was officially published throughout the SAPD.

3. Conspiracy to Obstruct Justice in State Court and to Intimidate / Penalize Parties and Witnesses in Federal Court

There was a significant body of evidence submitted at trial showing an extended pattern of conduct by numerous defendants to retaliate for a variety of conduct protected by the First Amendment, including efforts to seek redress in state and federal courts. Commencing in early January 1978, Chief Davis told senior personnel officials that he would "squash" the LPOA. Thereafter, complainants were

subjected to peer ostracism and selective enforcement of rules.

The retaliatory conduct injured petitioners in two distinct ways. First, substantial damage was done to petitioner Caro's state court action, resulting in the adverse judgment because of the witnesses who were intimidated from testifying, false evidence and testimony given in the state court proceedings, and other distortions of the record.

Thus, nine (9) officers recanted from the LPOA grievance and refused to testify at the Caro hearing about the discrimination and retaliation. The remaining seven (7), including petitioners, were each penalized for the "form" of their LPOA complaints, were subjected to peer ostracism and selective enforcement of the rules by supervisors, and expressly penalized in promotional matters because of

their "lack of objectivity." By the time of the hearing, four (4) of the seven (7) had recanted.

Several witnesses [defendants herein] also testified falsely at Caro's state hearings on the merits of the charges against him, and induced another to commit perjury. Defendant Chief Davis lied at the state court hearing, declaring that he had not prejudged Caro's termination. Confidential memorandums discovered in this federal action showed that he had rejected Caro's defenses before the investigation was completed and that he secured the firing of the AAO for "interference" in the SAPD. At Caro's hearing, considerable reliance was placed on the taped denials of the suspect who was unavailable for cross-examination at the hearing because the suspect was released without charges, even though he first confessed to numerous

burglaries.

A civilian employee, Christine Schuller, offered to testify for Caro and was immediately subjected to a formal investigation for "gossiping" and was threatened by several supervisors. [Exhibits 235-37]. When she "voluntarily" declined to testify, the disciplinary action against her was then dropped, with the notation that her "behavior had been modified." [Exhibit 235].

Caro's termination was upheld, based on the testimony of the very same supervisors who were subjects in the grievances and active in the selective enforcement of the rules against petitioners. Only later, long after the state judgment was final, did a half-dozen of these witnesses come forward and testify about the pervasive fear in the SAPD.

Secondly, petitioners were injured in

their persons and property, as both parties and witnesses in clearly anticipated federal court actions, as each had filed federal EEOC complaints in March-May, 1978 as necessary preconditions for pursuing Title VII claims. Sanchez was subjected to almost daily disciplinary action. Torres was grilled in a promotional examination about the LPOA grievance, and was rated well down the promotion list, after having reached the top of the list before the LPOA grievance was submitted. And petitioners were denied police back-up in duty situations as part of the ostracism.

C. Directed Verdict and Post-Trial Rulings

On June 18, 1985, following three (3) months of trial on the remaining claims after partial summary judgment, the district court directed a verdict on all

remaining claims [Appendices M & N]⁴. Final judgment was then entered. [Appendix O]. Both sides appealed from the final judgment and both sets of appeals were briefed in a consolidated briefing schedule. [Appendices A-H].

In July 1990, the Ninth Circuit issued its opinion, affirming in part and reversing in part. [Appendix F]. The panel reversed and remanded for a new trial the claims of petitioners Sanchez and Torres, against twelve (12) individual defendants, for first amendment retaliation, for discrimination in the promotional process, and for a racially discriminatory atmosphere. [Appendix F]⁵.

⁴. A jury verdict of \$900,000. was entered in favor of petitioner Sanchez on his due process claim.

⁵. The panel set aside the attorneys' fee award, but affirmed the denial of Sanchez' attorneys' fees in the related appeal. [Appendix F].

In its first amended opinion on February 27, 1991, the panel reversed itself, and ruled that a discriminatory atmosphere claim could not be pursued under sec.1981, and treated the directed verdict motion as implicitly including a Rule 41 motion under Title VII. [Appendix G]. The panel declined petitioners' repeated urgings that the matter should be remanded for a jury trial under the equal protection clause and sec.1983. [Appendix G]⁶. On May 24, 1991, the panel again amended its opinion, denied rehearing, and extended the time for filing this petition by sixty (60) days. [Appendix H5-7]⁷.

⁶. The Ninth Circuit also ruled that Sanchez was entitled to attorneys' fees in the district court for his verdict, but ruled that neither party was entitled to attorneys' fees or costs on appeal. [Appendix G].

⁷. Awarding Sanchez' attorneys' fees on the appeal from his verdict. [Appendix H5-7].

ARGUMENT

I. WHETHER CERTIORARI SHOULD BE GRANTED BECAUSE THE NINTH CIRCUIT IS AT ODDS WITH OTHER CIRCUITS IN PERMITTING A MUNICIPAL POLICE DEPARTMENT TO REQUIRE EXHAUSTION OF THE INTERNAL CHAIN OF COMMAND AS A PRECONDITION TO EXERCISING RIGHTS UNDER TITLE VII AND THE FIRST AMENDMENT TO COMPLAIN OF WORKPLACE DISCRIMINATION TO THE EMPLOYER'S AFFIRMATIVE ACTION OFFICER?

In upholding the SAPD policy requiring an officer to exhaust the chain of command before complaining of work[place discrimination to the City Affirmative Action Officer [AAO], the Ninth Circuit declared:

"[W]e have held that a police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees. [Citations omitted]. The SAPD's policy of bringing grievances first through appropriate channels to authorities in the department before bringing them to the City or the public is reasonable and not arbitrary. There was no constitutional violation in requiring officers to communicate 'through channels' before enlisting public opinion to their cause."

[Appendix H23]. This issue presents an

important question of whether the Ninth Circuit is correct in applying a rule, rejected by other circuits, permitting a police department to punish an officer for bringing a discrimination complaint to the employer's AAO without first bringing it through the chain-of-command.

Despite the panel's references to "enlisting public opinion," the issue presented by the facts is whether the First Amendment and Title VII permit an employer to enforce a grievance procedure that requires an employee to complain first to his supervisor and his chain-of-command before presenting accurate or good faith complaints of discrimination to other government bodies or officers authorized by law to investigate complaints of discrimination.

The first step in a first amendment claim is a question of law, determined by

balancing the free speech interests of the employee against the state's interest in providing efficient public service. See Connick v. Myers, 461 U.S. 138, 148 n.7 (1983); Pickering v. Board of Education, 391 U.S. 563, 568 (1968). Several circuits have addressed the question of whether an employer may enforce a grievance or chain-of-command procedure as a prerequisite to an employee's complaints about official misconduct. In Czurlanis v. Albanese, 721 F.2d 98, 105-106 & n.6 (3rd Cir. 1983), the Third Circuit expressly declared that

"such a policy cannot be used to justify retaliatory action . . . under the rubric of the [governmental] interest in promoting the efficiency of public service. . . . A policy which would compel public employees to route complaints about poor departmental practices to the very officials responsible for those practices would impermissably chill such speech."

Id., 721 F.2d at 105-106. See Hickory Fire Fighters Ass'n. v. City of Hickory, N.C.,

656 F.2d 917, 921 (4th Cir. 1981); Atchinson v. Siebman, 605 F.2d 1058, 1063 n.5 (8th Cir. 1979).

The panel opinion herein sought to distinguish this case by reasoning that a "police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees." [Appendix H23]. However, "policemen, like teachers and lawyers, are not relegated to a watered down version of constitutional rights." Garrity v. New Jersey, 385 U.S. 493, 500 (1967). Yet, the Ninth Circuit is now in conflict with several circuits about the proper application of "chain-of-command" rules, having adopted a rule which expressly "waters down" the First Amendment rights of police officers to complain privately to the employer's officially designated AAO concerning workplace discrimination.

The Tenth Circuit, after noting the "heightened interest of a police department in maintaining discipline and harmony," flatly rejected the contention that that public interest justified punitive action against a police officer who wrote to the attorney general to complain of official misconduct that addressed matters of public concern. See Wulf v. City of Wichita, 883 F.2d 842, 861-62 (10th Cir. 1989). The Fourth Circuit also concluded, in respect to a fire department, also a para-military organization, that the availability of a grievance procedure does not justify a restriction on speech. See Hickory Fire Fighters' Ass'n, *supra*, 656 F.2d at 921.

It is particularly inappropriate for a municipal employer to assert that the public interest requires more restrictive rules on the exercise by police officers of First Amendment rights when there are

express state and municipal policies to the contrary. The State of California has expressly enacted a statute designed to ensure that police officers have the same free speech and petition rights as all other employees, see Cal.Gov.Code secs.3302 & 3304 (rights of police officers to engage in political activity and utilize any "existing administrative grievance procedure"). [Appendices P & Q]. These statutory protections are incorporated verbatim into the SAPD's own Departmental Order 26A, and the City has an express policy permitting all employees to bring complaints of discrimination directly to the AAO for investigation and resolution. [Exhibit 16].

Title VII affords express protection against employer retaliation against any employee for resorting to any state or federal complaint procedure contemplated by

the act, or for opposing discrimination in general. See 42 U.S.C. sec.2000e-3(a)⁸. Federal regulations require the City to have an AAO who will have direct contact with minority employees and the authority to investigate discrimination complaints. See 28 C.F.R. 42.304(i) (1977); 41 C.F.R. 60-2.22 (1977). Yet, the Ninth Circuit gave no special consideration at all to Title VII protections and the fact that Sanchez' discrimination complaint was made to the City's AAO.

This Court has held that an employer-city is not "insulate[d] from liability" merely because it has "a grievance procedure and a policy against discrimination, coupled with [plaintiffs'] failure to invoke that procedure." See Meritor Savings Bank v. Vinson, 477 U.S.

⁸. Section 704(a) of Title VII.

57, 72-73 (1986). In explaining this rule, this Court further stated:

"[Defendant City's] general nondiscrimination policy did not address sexual harassment in particular, and thus did not alert employees to their employer's interest in correcting that form of discrimination. . . . Moreover, the bank's grievance procedure apparently required an employee to complain first to her supervisor Since [the supervisor] was the alleged perpetrator, it is not altogether surprising that [plaintiff] failed to invoke the procedure and report her grievance to him. [Defendants'] contention that [plaintiff's] failure should insulate it from liability might be substantially stronger if its procedures were better calculated to encourage victims of harassment to come forward."

Id., 477 U.S. 72-73. Although Vinson does not decide the issue presented herein, it provides a strong indication that this new rule adopted by the Ninth Circuit is contrary to the purposes and policies of Title VII and various federal regulations implementing those policies.

The D.C. Circuit has recognized an employer's valid interest in a reasonable rule requiring employees to inform it of claims of discrimination. However, this only means that the employer "be given sufficient, even if technically flawed, notice of the grievance," as the employer

"[has] a duty . . . to root out discrimination, and that responsibility is hardly discharged by reliance on technical miscues that could easily have been rectified without harm to anyone."

Bethel v. Jefferson, 589 F.2d 631, 645-46 (D.C. Cir. 1978).

In this case, Sanchez' complained to the City AAO that his and other supervisors at all levels had tolerated for four (4) days the department-wide distribution of several copies of a racially offensive cartoon -- as he was invited to do on all such complaints by City policy and pursuant to federal regulations. The accuracy of

the complaint is undisputed, and no one ever contended that Sanchez released the complaint to the public. The AAO immediately referred the matter to the chief of police for investigation.

The City and the SAPD had only a general nondiscrimination policy, and no specific policy prohibiting racial humor in a duty context. And the Ninth Circuit panel itself concluded that

"there is abundant evidence in this record that the City could have avoided much of the problem [herein] by employing a less confrontational approach to departmental grievances"

[Appendix H28]. Yet, the panel's opinion herein treated Sanchez' private complaint⁹ to the City AAO as equivalent to a public

⁹. Cf. Givhan v. Western Line Consolidated School Dist., 439 U.S. 410 (1979) (in first amendment claim, employer may not invite employees to submit grievances to department head, then punish employee for doing so).

complaint made to "enlist public opinion to [his] cause." The fundamental purpose of the schemes in both Title VII and the related federal regulations is to accomplish employer compliance, at the earliest and least formal stage, by ensuring that employees have the means and protection to safely bring their discrimination complaints to authorities legally responsible for investigating and dealing with workplace discrimination. This purpose is undermined if the employer is permitted either to require complaining employees to first run the gauntlet of the perpetrators, or to penalize complaining employees for resorting to authorities empowered by law to receive and investigate such complaints.

Indeed, a "chain-of-command" policy combined with a "custom" of mid-level supervisors to intercept and derail

complaints of discrimination or other like misconduct may serve as a vehicle for shielding senior management and the entity from responsibility for correcting the misconduct and legal liability for failing to do so¹⁰. See Brandon v. Holt, 469 U.S. 464, 467 (1985).

The important issue is therefore presented of whether the rights of complaining officers and reasonable public interests are best served by a rule that permits officers to discreetly present their accurate or good faith complaints of discrimination to any body or official having authority under law to receive and investigate such complaints. Petitioners

¹⁰. Petitioners submitted substantial evidence herein of numerous and extensive efforts over several years to utilize the chain-of-command to seek redress for their continuing complaints of discrimination, with no success or official action except retaliation against the complainants.

urge issuance of a writ of certiorari to address this issue, and the conflict between the Ninth Circuit and other circuits who have addressed the issue and reached a different conclusion.

II. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE THE SCOPE OF THE INJURIES REMEDIABLE UNDER 42 U.S.C. SEC.1985(2) BASED ON A CONSPIRACY TO OBSTRUCT JUSTICE IN STATE COURT AND TO INTIMIDATE AND PENALIZE PARTIES AND WITNESSES IN FEDERAL COURT?

This petition presents the important question of whether 42 U.S.C. sec.1985(2) provides a remedy for the wrongs and injuries expressly described in the statute, given the express rule in the Ninth Circuit to the contrary. On its face, 42 U.S.C. sec.1985(2) expressly provides a damages remedy for any injuries arising for either of two types of conspiracies: (a) to obstruct justice in state court, with a discriminatory motive, resulting in injury; and/or (b) to

intimidate or penalize a party or witness in federal court, resulting in injury. The section expressly refers to physical injuries inflicted on either parties or witnesses, and expressly provides a damages remedy for any "person" so injured¹¹. See Kush v. Rutledge, 460 U.S. 719, 724 & 727 n.9 (1983).

The Ninth Circuit rule, however, as reflected in this and a prior ruling, bars remedies for all injuries other than injuries to a party in a prior action who suffered damage to that action, see David v. United States, 820 F.2d 1038, 1040 (9th Cir. 1987) (see Discussion at IIA, infra), and only then if the prior action did not reach a final judgment, since the obstruction of justice claim could have

¹¹. The remedy provision for sec.1985(2) is located at the end of sec.1985(3). See Kush, supra, 460 U.S. at 724 & 727 n.9.

been raised in the state proceeding in which it occurred and Caro received "minimum due process" (see Discussion at IIB, infra). [Appendix H17-18, 24-26]. Under this rule, sec.1985(2) provides no remedy at all for physical and emotional injuries; no remedy for damage to property other than an underlying cause of action that has not yet reached final judgment; and no remedies for any witness, no matter how damaged or injured by the conspirators. See id., 820 F.2d at 1040.

All petitioners claimed that defendants conspired to intimidate and penalize them -- as parties and as witnesses for each other -- in petitioners' federal court actions; and further, that they conspired to intimidate and penalize numerous other witnesses in the same federal actions; and that the overt acts in furtherance caused various personal and

property injuries. Under the Ninth Circuit rule, however, there being no evidence that any petitioner's federal claims were damaged as a party plaintiff, these claims and injuries were disregarded.

Therefore, this issue presents two important questions for this Court: (a) Is the Ninth Circuit correct in limiting the claims available under sec.1985(2) to parties and the remedies to damages to an underlying cause of action? and (b) Is the Ninth Circuit correct in applying rules of preclusion to a sec.1985(2) claim from a prior state court judgment when the judgment is caused by the very obstruction of justice for which sec.1985(2) purports to provide a remedy?

A. Whether Certiorari Should Be Granted to Determine Whether 42 U.S.C. Section 1985(5) Provides a Remedy for Injuries Caused by Acts in Furtherance of a Conspiracy to Obstruct Justice in State Court or to Intimidate or Punish Parties or Witnesses in Federal Court, other than Injuries to the Underlying State or Federal Action?

The Ninth Circuit has held that sec.1985 provides no remedy for a person who claims that she was terminated from employment because she testified in favor of another employee in another action. See David, supra, 820 F.2d at 1040 (9th Cir. 1987). This decision extrapolated from a previous holding, concluding that the injury element in a sec.1985(2) witness intimidation claim can be met by showing damage to the underlying federal action, see Miller v. Glen & Helen Aircraft, Inc., 777 F.2d 496, 498 (9th Cir. 1985), to conclude:

"Allegations of witness intimidation under sec.1985(2) will not suffice for a cause of action unless it can be

shown the litigant was hampered in being able to present an effective case. [Citing Miller]. Since David has not shown she was a party to the actions in which she was intimidated, she can show no injury under sec.1985(2)."

David, supra, 820 F.2d at 1040 (emphasis in original). The David Court expressly declined to treat allegations that David was harassed, threatened and terminated because of her testimony in a federal action as being actionable or remediable injuries under sec.1985(2).

The panel herein essentially did the same thing as in David. The panel only considered, in respect to the conspiracy claims, the evidence which would tend to establish damage to the underlying state court action of petitioner Caro -- i.e. false testimony. Thus, in affirming the directed verdicts on the conspiracy claims, the panel did not consider the substantial evidence on which the panel remanded the

First Amendment retaliation claims of petitioners Sanchez and Torres for a new trial against eight (8) individual defendants, including the chief of police, two (2) captains, three (3) lieutenants, and an internal affairs sergeant. The evidence on which the panel remanded the First Amendment claims included a ruling that the protected activities were "the filing of EEOC complaints, the instigation of legal activity . . . and Sanchez's and Torres's public support of Caro."¹² [Appendix H22]. The panel also noted that there was substantial evidence supporting the claims that those eight (8) defendants were legally responsible for the retaliation which took the form of peer ostracism and silent treatment, selective enforcement of the rules, maintaining

¹². The defendants conceded that this activity is protected. [Appendix H22].

secret files on petitioners, withholding backup in duty situations, and penalizing Torres in promotional decisions. [Appendix H21-23].

The panel also declared that there was "no evidence of an obstruction of justice aimed at a class" under sec.1985(2), citing Kush, supra. [Appendix H25]. However, a discriminatory class-based motive is not required in claims involving the right to unhindered access to federal courts -- i.e. injuries caused to parties or witnesses in a conspiracy to intimidate or penalize them. See id., 460 U.S. at 726-27.

Moreover, the panel concluded that there was substantial evidence of a discriminatory workplace environment, including pervasive racial slurs and jokes, racial tensions surrounding promotional examinations, and mistreatment of the LPOA and its members. [Appendix F20]. The LPOA

activity, the EEOC complaints, and related legal activity involved allegations concerning this very discriminatory environment and defendants' contributions to it, and it was this activity which was concededly deemed as protected activity. [Appendix H21-23]. The panel has also remanded for trial petitioners' claims of discrimination in the promotional process [Appendix 6-7, 14-15], based on the claim that there no Hispanic sergeants out of 42 sergeants in the SAPD, at a time when one third of the SAPD rank and file was Hispanic.

At trial, petitioners presented (a) two senior City personnel department witnesses who testified that Chief Davis intentionally incited a mass meeting of officers against a city promotional examination for sergeant as unfairly favoring Hispanic officers, and

successfully torpedoed the plan; (b) documentary and testimonial evidence that eight persons who complained of discrimination and refused to withdraw their complaints¹³, including petitioners, were subjected to disciplinary treatment for the forms of their complaints; and (c) four officer witnesses which corroborated petitioners' testimony that there was widespread fear in the SAPD because of the ostracism and retaliation, and that nine minority officers, including the four who testified, decided to withdraw from the LPOA grievance and from supporting petitioners' initial litigation efforts, including the whole of Caro's state action. [Appendix H6-8].

The holding in David and implicitly

¹³. Nine other complainants did, including four who testified at trial as to the intimidation that motivated them in doing so.

applied herein, restricting the application of sec.1985(2), is contrary to the plain language of sec.1985¹⁴. The remedy provision for sec.1985(2), located at the end of sec.1985(3), see Kush, supra, 460 U.S. at 724 & 727 n.9, specifically states that

"if one or more persons engaged therein do . . . any act in furtherance of the object of such conspiracy, whereby another is injured in his person or his property, . . . the party so injured . . . may have an action for the recovery of damages by such injury or deprivation"

42 U.S.C. sec.1985(3) (emphasis added). The section also provides for a specific death benefit where the injury results in death. Clearly, the section provides a

¹⁴. The Second Circuit case cited in David, see David, supra, 820 F.2d at 1040, provides no support whatever for such a narrow reading of the remedial provisions of the statute, see Chahal v. Paine-Webber, Inc. 725 F.2d 20, 24-25 (2nd Cir. 1984) (holding that sec.1985(2) claim requires some injury, which may be proved by damage to underlying action).

remedy for any person injured -- including injury to the person -- by any act in furtherance of the conspiracy. There is no rationale for reading that language to exclude such injuries, or to limit the claims for relief to party litigants.

Indeed, when sec.1985(2) was enacted as part of the "Ku Klux Klan Act" of 1871, compare Jett v. Dallas Ind. School Dist., 491 U.S. 701, 722 (1989) with Kush, supra, 460 U.S. at 724, "[t]he immediate impetus for the bill was evidence of widespread acts of violence perpetrated against the freedman and loyal white citizens by groups such as the Ku Klux Klan." Jett, supra, 491 U.S. at 722. Yet, under the David rule applied herein, sec.1985(2) provides no remedy for the violence or other physical or emotional carnage that might be inflicted on parties and witnesses alike.

Furthermore, David gives a truncated

quote from sec.1985(2), quoting only the language which refers to conspiracies "to deter, by force, intimidation, or threat, any party or witness . . . from testifying to any matter pending therein, freely, fully, and truthfully." See David, supra, 820 F.2d at 1040 n.3. The section continues, however, with the following language: "or to injure such a party or witness in his person or property on account of his having so attended or testified." See 42 U.S.C. sec.1985(2).

Clearly, any party or witness injured in his person for having appeared or testified -- i.e. after the fact -- is not going to be able to establish that the litigant was hampered in his ability to present the case which preceded the actionable conduct by the defendants. Thus, the Ninth Circuit has effectively destroyed claims, such as presented by

petitioners herein, that they were punished in the terms and conditions of their employment for having pursued their federal remedies in federal court and/or for having been intended witnesses in each other's claims, resulting in injuries to their persons and property.

When the David rule is combined with the rule that applies preclusive effect in a sec.1985(2) claim from a state court judgment obtained by an obstruction of justice as described under sec.1985(2), see Discussion, infra at Section IIB, the entire section is eviscerated. Thus, petitioners urge this Court to issue a writ of certiorari to resolve whether sec.1985(2) provides remedies for witness and party claims, and for the types of personal injuries, for which the statutory language seems to plainly provide.

B. Whether 42 U.S.C. sec.1985(2) Provides a Remedy for Injuries Caused by a Conspiracy to Obstruct Justice in a State Court When the Acts in Furtherance of the Conspiracy Cause a Final Judgment that Would Otherwise Have Claim / Issue Preclusive Effect?

This petition also present the important question of whether issue and claim preclusion should apply to claims under 42 USC sec.1985(2) upon proof that a conspiracy to obstruct justice in state court or to hamper access to a federal court, as described therein, was so successful that it resulted in an adverse judgment in the underlying action. Petitioners urge that the Ninth Circuit has erred in applying rules of preclusion in such circumstances because they are contrary to the express Congressional purpose of sec.1985(2), as reflected in the plain meaning and the legislative history of the act.

Claim and issue preclusion generally

apply to civil rights actions as with all other civil actions, Kremer v. Chemical Const. Corp., 456 U.S. 461, 471 (1982), unless the "party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate the claim or issue." id., 456 U.S. at 480. Normally, a "full and fair opportunity to litigate" has been provided by the "state proceedings [when they] satisfy the minimum procedural requirements of the Fourteenth Amendment Due Process Clause. . . ." Kremer, supra, 456 U.S. at 481.

"As a general matter, . . . '[r]edetermination of the issues [may nevertheless be] warranted if there is reason to doubt the quality, extensiveness, or fairness of procedures followed in prior litigation.'"

Haring v. Prosise, 462 U.S. 306, 316-18 (1983) (emphasis added).

A well recognized exception to preclusion rules is that preclusion will

not apply when the prior judgment is obtained by fraud or some other form of dishonesty affecting the integrity of the proceeding. See Commissioner of Internal Revenue, 333 U.S. 591, 597 (1948) (preclusion "absent fraud"); Restatement (Second) of Judgments, sec.26 comment j (1982) (preclusion cannot be asserted by party who caused prior judgment by his own "mistake or fraud, concealment, or misrepresentation").

Thus, when the prior state judgment has been obtained by perjured testimony, false evidence, concealment of relevant information, intimidation of witnesses, and/or undue or improper influence upon the trier of fact, courts have declined to afford it any preclusive effect. See McCarty v. First of Georgia Ins. Co., 713 F.2d 609, 612-13 (10th Cir. 1983) (fraud); Ketchum v. U.S. Department of Transp., 672

F.Supp. 450, 452 (D.Nev. 1987) (alteration of evidence and perjury); Miller v. United States, 438 F.Supp. 514, 523 (E.D.Pa. 1977) (fraud) (dictum). Given that state law also generally declines to give preclusive effect to judgments obtained by fraud, concealment or misrepresentation, see Restatement (Second) of Judgments, sec.26 comment j (1982); Leeper v. Beltrami, 53 Cal.2d 195, 205, 11 Cal. Rptr. 12 (1959) (California law permits collateral attack on judgment fraudulently obtained), "federal courts would still be providing a state court judgment with the 'same' preclusive effect as the courts of the State from which the judgment emerged." Kremer, supra, 456 U.S. at 482.

The Ninth Circuit ruled that the district court properly applied preclusion principles when it entered judgment as to petitioner Caro's claims that he was

subjected to an unlawful conspiracy under 42 U.S.C. sec.1985(2) to obstruct justice in a state court, proximately causing the resulting adverse state court judgment, because: (1) he could have raised the obstruction of justice claims in the state court; (2) the state proceeding need only have satisfied minimum due process; and (3) preclusion principles applicable to sec.1983 claims should apply equally to sec.1985(2) claims. [Appendix H16-18].

The Supreme Court has yet to apply claim or issue preclusion principles to 42 U.S.C. sec.1985(2). In applying it to other civil rights provisions, however, the Court expressly based its rulings on the reasoning that nothing in the "language of sec.1983 remotely expresses any intent of Congress to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor

of 28 U.S.C. sec.1738. . . ." Allen v. McCurry, 449 U.S. 90, 97-98 (1980).

The very purpose of sec.1985(2), however, is to deal with obstructions in state courts. Two circuits, in addressing the damages provision which applies to conspiracies in both state and federal courts, have concluded that the plaintiff can meet his burden of proving injury by proof that the conspirators damaged his court action. See David, supra, 820 F.2d at 1040 & n.3; Miller, supra, 777 F.2d at 498 & n.2; Chahal, supra, 725 F.2d at 24-25. In Miller, under the related provision for federal courts under the first clause of sec.1985(2), the Court reasoned that

"witness intimidation, if proved, could be shown to have resulted in injury to [plaintiff] by hampering his ability to present an effective case against [defendant] in the earlier federal lawsuit."

Id., 777 F.2d at 498. The ultimate injury in such a circumstance is an adverse judgment caused by the obstruction of justice, and the injury is complete once that has occurred.

State administrative and judicial findings concluded that Caro had failed to present any evidence in those proceedings to support his claims of discrimination or retaliation as motives for the decision to terminate him or of a biased investigation. However, the point of such a conspiracy, if successful, is to inhibit or obstruct, either completely or partially, a plaintiff's ability to present an effective case in the state court. See Miller, supra, 777 F.2d at 498.

The Ninth Circuit, however, extended preclusion principles to sec.1985(2) without any analysis of the differing language and purposes of the civil rights

acts. The conclusion of the panel opinion rested instead on the reasoning that petitioner Caro could have raised the obstruction of justice claims in the state proceedings.

The Ninth Circuit thus failed to consider that sec.1985(2) is intended to provide a federal remedy in a federal forum for conspiracies to obstruct justice causing harm to a state cause of action, regardless of whether the injured party might also have a state cause of action to the same effect. See Jett, supra, 491 U.S. at 723; Will v. Michigan Dept. of State Police, 491 U.S. 58, 66 (1989); Monroe v. Pape, 365 U.S. 167, 183 (1961). Requiring the injured party to pursue the obstruction of justice claim in the very state proceeding in which the obstruction successfully occurs is not only illogical, but it creates a conclusive bar to any

further litigation of the sec.1985(2) claim in the federal forum at any time. See Migra v. Warren City School Dist., 465 U.S. 75 (1984) (claim preclusion applies regardless of outcome of prior state action).

Under the rule adopted by the panel opinion herein, sec.1985(2) will only apply to those rare state court actions which, for some reason, were never completed on the merits. This rule thus strips sec.1985(2) of any meaning or vitality and is clearly contrary to the express intent of the statute.

Full meaning to the language and purpose of sec.1985(2) can be accorded by interpreting the constitutional requirement of a "full and fair opportunity to litigate" to mean that the prior judgment was not obtained by the fraud or misconduct of the party seeking to invoke the rules of preclusion. Principles underlying

preclusion can also be served by placing the burden on the plaintiff to prove not only that there was an obstruction of justice, but also that the obstruction of justice caused the prior state court judgment and/or any adverse findings of fact.

Therefore, petitioners respectfully urge this Court to issue a writ of certiorari to decide the important issue of accommodating the public policy purposes of rules of preclusion under 28 U.S.C. sec.1738 with the public policy purposes of the federal remedies provided for claims of obstruction of justice in a state court under 42 U.S.C. sec.1985(2), without frustrating either.

III. WHETHER CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT AND 42 U.S.C. SEC.1983 PROVIDE A REMEDY FOR A CLAIM OF A RACIALLY DISCRIMINATORY WORKPLACE ENVIRONMENT IN PUBLIC EMPLOYMENT?

This Court determined in respect to private employers that 42 U.S.C. sec.1981 does not provide a damages remedy for a discriminatory workplace environment, see Patterson v. McClean Credit Union, 491 U.S. 164 (1989), and that in such cases, the employee's only remedy is under Title VII. In doing so, this Court did not alter the rule that Title VII remedies are supplemental to those found under the Civil Rights Acts of 1966 and 1871 (secs.1981-1986)¹⁵, but instead merely interpreted the language of sec.1981 to exclude such

¹⁵. The Patterson Court permits sec.1981 contract formation claims as a remedy independent and supplemental to Title VII. See Johnson v. Rwy Express Agency, 421 U.S. 454, 457-61 (1975).

post contract formation claims. See id.

This issue presents the important question of whether proof of a racially discriminatory workplace environment in public employment states a claim for violation of the equal protection clause which would then be remediable under 42 U.S.C. sec.1983.

The initial panel opinion held that petitioners had submitted substantial evidence to support a claim of a discriminatory workplace environment, and remanded it for a new trial by jury as to the City and several individual defendants. [Appendix F18-21]. The panel thereafter amended its opinion, determining that because 42 U.S.C. sec.1981 no longer embraces such post contract formation

claims, citing only Patterson, supra¹⁶, and because Title VII claims do not entitle plaintiffs to a jury trial, the district court's directed verdict was also sub silentio a ruling under F.R.C.P. 41 granting judgment on the Title VII claims¹⁷. Then, applying the clearly

¹⁶. The Ninth Circuit invoked the application of Patterson even though respondents did not urge the legal inapplicability of sec.1981 prior to its Petition for Rehearing after the first panel opinion herein in July 1990. This Court flatly rejected similar attempts by the employer-defendants in both Patterson and Jett. See Patterson, supra, 491 U.S. at 184-86 (refused to consider whether discriminatory discharge is actionable under sec.1981 because not raised below); Jett, supra, 491 U.S. at 711 (refused to apply Patterson because issue not raised below). Accord, Kimbrough v. Bowman Transportation, 920 F.2d 1578, 1582 (11th Cir. 1991); McGinnis v. Ingram Equipment Co., Inc., 918 F.2d 1491, 1495-97 (11th Cir. 1990) (en banc) (expressly rejecting argument that employer could not anticipate Patterson in appellate briefing in 1989).

¹⁷. A Rule 41 motion was never made by defendants, and it was first raised by them in their Petition for Rehearing in

erroneous standard, the panel affirmed the judgment in favor of defendants on the discriminatory atmosphere claims. [Appendices G22-24 & H19-21].

In applying Patterson, which dealt with a private employer, the Ninth Circuit assumed without saying so that a discriminatory atmosphere claim may not be properly asserted directly under the equal protection clause and sec.1983¹⁸. Jett, decided a week after Patterson, leaves this

July 1990.

¹⁸. The discriminatory workplace environment claim, as all other issues in this case, was preserved in the pretrial orders and tried to a jury under both sections 1981 and 1983. Petitioners urged in their Opening Brief filed before Patterson that the City should be held to answer under the broader standards of sec.1981, and that individual liability under sections 1981 and 1983 are coextensive. [Petitioners' AOB, p.62]. When directed by the panel to respond to these new arguments, petitioners urged that the same factual claim should be remanded for a new trial by jury under the equal protection clause and sec.1983.

question open while holding that, with public employers, the exclusive avenue for redressing rights created under 42 U.S.C. sec.1981 is 42 U.S.C. sec.1983. See Jett, supra, 491 U.S. at 735-36. The panel's exclusive reliance on Patterson can only be explained by the assumption that it viewed Patterson and Jett as precluding any remedy for a discriminatory workplace environment except under Title VII¹⁹.

However, the Patterson analysis only addressed the particular statutory language in sec.1981 and its legislative history. None of the statutory analysis of sec.1981 applies to an interpretation of the scope of the equal protection clause or the remedial provisions of sec.1983.

Moreover, the panel applied Patterson

¹⁹. The opening paragraph of the opinion expressly states that all claims were based simultaneously under sections 1981 and 1983. [Appendix H6].

only after it had already determined in a previous ruling that there was substantial evidence of a discriminatory workplace environment, and that the district erred in failing to submit the matter to the jury²⁰. Had the district court not issued its erroneous directed verdict, as the panel concluded in the first instance [Appendix F18-21], then the claim of a racially discriminatory workplace environment would have been submitted to the jury under both section 1981 and 1983.

By later applying Patterson to preclude a remand for a new trial, the panel's holding is combining with the erroneous directed verdict of the district court to frustrate petitioners' right to a jury trial. This appears entirely

²⁰. When the panel reversed itself, it did not change this conclusion. Instead, it applied the clearly erroneous standard to uphold the defense judgment.

inappropriate, in light of the Supreme Court's unanimous recent declaration that:

"Only the District Court's erroneous dismissal of the sec.1981 claims enabled that court to resolve [Title VII] issues . . . that otherwise would have been resolved by a jury. . . . It would be anomalous to hold that a district court may not deprive a litigant of his right to a jury trial by resolving an equitable claim before a jury hears a legal claim raising common issues, but that a court may accomplish the same result by erroneously dismissing the legal claim. Such a holding would be particularly unfair here because [plaintiff] was required to join his legal and equitable claims to avoid the bar of res judicata."

Lytle v. Household Manufacturing, Inc., 494 U.S. ___, 108 L.Ed.2d 504, 515 (1990). This Court then remanded the issue to determine whether there were indeed any sec.1981 claims to be properly submitted under sec.1981 on remand, but clearly held that a plaintiff's jury trial right cannot be denied as a by-product of an erroneous judicial ruling. See id.

If the claim for a discriminatory workplace environment had been submitted to the jury under sections 1981 and 1983, and resulted in a verdict for plaintiffs, the Patterson and Jett rulings would not have required reversal of the judgment -- unless the jury was instructed on the law in a manner that is inconsistent with sec.1983 law, see Jett, supra, 491 U.S. 735-36; or unless there is no such claim available against a state actor directly under the equal protection clause and sec.1983.

Prior to Patterson and Jett, several circuits, in addressing sex discrimination claims which were never remediable under sec.1981, had concluded that employment discrimination claims against a state actor that are actionable under Title VII may also be pursued under sec.1983. See Roberts v. College of the Desert, 870 F.2d 1411, 1414-16 (9th Cir. 1988); Keller v. Prince

George's County, 827 F.2d 952, 963-64 (4th Cir. 1987); Ratliff v. City of Milwaukee, 795 F.2d 612, 623-24 (7th Cir. 1986); Trigg v. Fort Wayne Community Schools, 766 F.2d 299, 301 (6th Cir. 1980); Grano v. Department of Development, 637 F.2d 1073, 1075 (6th Cir. 1980). And following Patterson, two circuits addressing parallel section 1981 and 1983 claims reaffirmed the availability of general sec.1983 claims against public employers. See Brown v. City of Fort Lauderdale, 923 F.2d 1474, 1478-82 (11th Cir. 1991) (declining to address sec.1981 claim because sec.1983 held applicable on remand); Sims v. Mulcahy, 902 F.2d 524, 536-41 (7th Cir. 1990) (considering but rejecting sec.1983 claims based on evidence in trial record).

Jett, however, ruled only that "sec.1983 . . . provides the exclusive federal damages remedy for the violation of

the rights guaranteed by sec.1981 when the claim is pressed against a state actor." Jett, supra, 491 U.S. at 735 (emphasis added). This Court adopted this rule by invoking the general principle that the express statutory remedy in sec.1983 preempts resort to the more general remedies in sec.1981. See id., 491 U.S. at 732-34. However, by virtue of the decision in Patterson, there is no right to be free of a discriminatory workplace environment created or secured by sec.1981. That should in no way derogate from any rights secured by the equal protection clause, which presumptively would prohibit state actors from purposefully or intentionally subjecting employees to a racially discriminatory environment.

Petitioners therefore respectfully urge this Court to issue a writ of certiorari to address the important

question as to whether the equal protection clause and sec.1983 provide a remedy for a racially discriminatory workplace environment by a public employer, given that pursuant to Patterson, no remedy is afforded by sec.1981 for such a claim.

CONCLUSION

Petitioners therefore respectfully urge this Court to issue a writ of certiorari on each of the questions presented for review herein.

Dated: August 22, 1991

Respectfully submitted,

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APPENDIX A



FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellees,

v.

CITY OF SANTA ANA,
Defendant-Appellant,
and

CITY OF SANTA ANA POLICE
DEPARTMENT; DON BOTTS;
RAYMOND C. DAVIS; E. B. HANSEN;
ROBERT STEBBENS; NORWOOD
WILLIAMS; LEE DRUMMOND;
LAWRENCE PITZER; MICHAEL
LLEWELLYN; DALE STERZER; GARY
DIXON; JOHN COLLINS; JOHN
McDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN McCLAIN,
Defendants.

Nos. 86-6386
88-5855

D.C. No.
CV-79-1818-KN

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,

Plaintiffs-Appellees,

v.

CITY OF SANTA ANA,

Defendant,

and

NORWOOD WILLIAMS; LEE
DRUMMOND; LAWRENCE PITZER;
MICHAEL LLEWELLYN; DALE
STERZER; GARY DIXON; JOHN
COLLINS; JOHN McDANIELS;
MICHAEL LANNERS; WILLIAM BRUNS;
JOHN DITTUS; RICHARD FAUST;
JOHN McCLAIN,

Defendants-Appellants.

No. 88-5287

OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Filed July 11, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

*Judge Irving Hill, District Judge for the Central District of California,
presided over many of the pretrial orders.

Appendix A.2

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law

Affirming in part and vacating in part the district court's grant of summary judgment, the court of appeals held that the City of Santa Ana violated a police officer's due process rights by removing his merit pay and refusing to give him a post-removal hearing.

Appellant the City of Santa Ana appealed the district court's summary judgment in favor of appellant former city police officer Jesse Sanchez on his 42 U.S.C. § 1983 claim that the City violated his due process rights in removing his merit pay. The City also appealed the jury's damage award of \$400,000 in lost wages and \$500,000 for emotional distress.

[1] The City argued that Sanchez had no property interest in his merit pay. In order to have a property interest in a benefit, a person must demonstrate that he or she has a legitimate claim of entitlement to it, not merely a unilateral expectation. [2] Sanchez correctly asserted that prior to its amendment in June 1978, Santa Ana Charter Section 1008, the grievance procedure in effect at the time Sanchez began receiving merit pay, created a constitutionally protected property interest in merit pay. [3] A governing body does not create a property interest in a benefit merely by providing a particular procedure for the removal of that benefit. However, old Section 1008 did more than create an entitlement to an administrative appeal where a city employee's merit pay was removed. Old Section 1008 treated a reduction in pay as a demotion, and by providing that an employee may be demoted for certain specified reasons, implicitly restricted the City's authority to demote an employee to the specified reasons. [4] The

City argued that Sanchez did not have a property interest in his merit pay at the time it was taken away because the removal of merit pay had been excluded from Section 1008's grievance procedure pursuant to the June 1978 amendment. This amendment, however, took effect after Sanchez had progressed to merit step E. Sanchez thus had a vested property right to merit pay at the time he began receiving merit pay under old Section 1008. The City could not arbitrarily take away this right simply by amending Section 1008. Sanchez had a constitutionally protected property interest in his merit pay prior to the amendment of Section 1008.

[5] The City also contended that even if Sanchez had a property interest in his merit pay, the procedure the City followed in removing his merit pay satisfied due process. [6] Sanchez did not contend that he should have been given a pre-removal hearing. He was entitled to an administrative appeal or post-removal hearing to challenge the final decision to eliminate his merit pay. He received no hearing or opportunity to be heard at any time. [7] His property interest was taken without due process.

[8] The City contended that Sanchez waived his right to challenge the grievance procedure on the ground that he did not follow even the first step in the grievance procedure. [9] The facts do not support this contention. In accordance with Section 1008, Sanchez attempted to invoke the grievance procedure by requesting a written statement of the charges against him in his memorandum to Chief Davis, to which Chief Davis never responded. His subsequent memos to Captain Hansen and Lieutenant Jordan sought to clarify the grievance after Chief Davis failed to respond to Sanchez's initial memorandum invoking the grievance procedure. Sanchez did not waive his right to challenge the procedure.

[10] The court affirmed the damage award for lost income, but vacated the award for emotional distress. [11] The City contended that Sanchez's claim in federal court for emotional

distress was barred under *res judicata* principles by his workers' compensation award. On this point, the City prevailed.

COUNSEL

Charles Matheis, Jr., Santa Ana, California, for the defendants-appellants.

Meir J. Westreich, Glendale, California, for the plaintiffs-appellees.

OPINION

GOODWIN, Chief Judge:

The City of Santa Ana appeals the district court's summary judgment in favor of former city police officer Jesse J. Sanchez on his claim under 42 U.S.C. § 1983 that the City violated his due process rights in removing his merit pay. The City also appeals the jury's damage award of \$400,000 in lost wages and \$500,000 for emotional distress.¹ We have jurisdiction under 28 U.S.C. § 1291, and we affirm the summary judgment and affirm in part and vacate in part the damage award.

The City of Santa Ana Police Department hired Sanchez in late 1975 pursuant to a program to recruit Spanish-speaking officers. His salary was initially set at step C, the base salary for police officers hired from other police departments as lateral transfers. By April 1, 1978, Sanchez had progressed to

¹This opinion addresses the City's appeal from the summary judgment and damage award in favor of Sanchez. The appeal of Sanchez and the other two former police officers involved in this suit is addressed in *Sanchez v. City of Santa Ana*, Nos. 85-6504, 86-6226, 87-5614, 88-5853, slip op. — (9th Cir. 1990).

merit step E, the highest salary step, which is awarded on the basis of meritorious performance.

In February 1979, defendant Sergeant Collins, Sanchez's supervisor, prepared an annual performance review recommending that Sanchez's merit step E be removed because he was performing "below job standards." Excerpts of Record [ER] at 701-703. No action was taken at that time.

On March 14, 1979, defendant Captain Hansen submitted a memorandum to Chief of Police Davis recommending that Sanchez's merit step D be removed because of two disciplinary suspension recommendations from Sanchez's supervisors, Sergeant Collins and Lieutenant Williams. At the conclusion of the recommendation, Captain Hansen wrote: "This action should not be considered disciplinary. It is intended as an action based on substandard job performance." ER at 910-11.

On March 15, 1979, Sanchez left work during roll call, claiming emotional illness. Later that same day, his merit step E was formally removed, retroactive to March 1, 1979.

On March 26, 1979, Chief Davis approved in writing the removal of Sanchez's merit step D, effective April 1, 1979.

In a March 30, 1979 memorandum to Chief Davis, Sanchez indicated that he wished to contest the removal of his merit pay, and requested a written statement of the charges against him. Captain Hansen responded to Sanchez's memorandum, stating that the removal of his merit pay was not based on any specific charges against him other than a failure to perform at a level justifying merit pay. He further advised Sanchez that he could challenge the removal by arranging for an interview with Chief Davis or by relying on his written memorandum. It is undisputed that Chief Davis never responded to Sanchez's memorandum.

In an April 13, 1979 memorandum to Captain Hansen, Sanchez reiterated his request for a statement of the charges upon which the removal of his merit pay was based, because without such a statement he did "not know how to respond to the pay reductions in the grievance procedure." ER at 927. Captain Hansen again informed Sanchez that the removal of his merit pay was based solely upon his substandard performance, that he should submit a written grievance to, or request an interview with, Chief Davis, and that he could obtain further clarification of the grievance procedure from Lieutenant Jordan.

In an April 25, 1979 memorandum to Lieutenant Jordan, Sanchez requested an explanation of the procedure the department had followed in removing merit pay and of the grievance procedure to challenge its removal. He indicated that he wished to pursue the grievance procedure, but first wanted to understand the complete procedure. Lieutenant Jordan informed him that Santa Ana City Council Resolution 58-281 covered the procedure the department had used in removing Sanchez's merit pay and that Section 10.77 of the Santa Ana Police Department's Rules and Regulations covered the grievance procedure to challenge its removal. Resolution 58-281 provides that an officer's merit pay may be removed upon the recommendation of the head of the police department and the approval of the City Manager. Section 10.77 permits an employee to present grievances concerning adverse personnel action through channels up to and including the Chief of Police. Lieutenant Jordan's letter made no reference to the City's grievance procedure, Santa Ana City Charter Section 1008, which grants the right to a hearing before the Santa Ana Personnel Board.

Beginning on May 6, 1989, Sanchez took a four-month medical leave of absence. By letter dated September 6, 1979, Sanchez advised the City that his doctor had conditionally released him to return to work. He requested information

concerning his new work assignment, which the City provided the same day.

By letter dated September 10, 1979, Sanchez alleged that the removal of his merit pay was a demotion and a continuing pattern of discrimination which had caused him to suffer a stress reaction. He indicated that he would return to work only if his merit pay were restored.

Lieutenant Jordan phoned Sanchez on behalf of the City and denied his request for immediate restoration of his merit pay. Sanchez thereafter submitted a letter of resignation effective September 10, 1979.

Sanchez and two other former police officers filed in federal district court a complaint for damages and injunctive relief against the City, Chief Davis, and other named members of the department. The complaint alleged that the City had removed Sanchez's merit pay without due process of law, that Sanchez had been constructively discharged from his job, and that, as a result of emotional distress, he suffered from a work-related disability.

On February 7, 1983, the defendants filed a motion in limine, seeking in part a declaration that Santa Ana City Charter Section 1008, as amended, (the City's grievance procedure) was constitutional. Prior to its amendment in June 1978, Section 1008 granted to City employees whose pay had been reduced the right to a written statement of the charges leading to the pay reduction and the right to a hearing before the Santa Ana Personnel Board. The June 1978 amendment removed merit pay reductions from the coverage of Section 1008.

Sanchez responded by moving for summary judgment. He argued that the amended Section 1008 could not be applied retroactively to him because he had begun receiving merit pay prior to the effective date of the amendment, and that he

had a property interest in his merit pay which could not be taken away without due process.

On June 3, 1983, the district court granted partial summary judgment in favor of Sanchez and against the City and Chief Davis on Sanchez's due process claim. The court concluded that the City had denied Sanchez due process in removing his merit pay, and that the denial of due process was a proper claim under 42 U.S.C. § 1983. The court subsequently exonerated Chief Davis of personal liability and reserved for trial the issue of the scope, nature and amount of damages against the City.

Following a trial on the issue of damages, the jury determined that the due process violation constituted a constructive discharge, and awarded Sanchez \$400,000 in lost income and \$500,000 for emotional distress. After the City's post-trial motions were denied, the City brought this appeal.

I. The Summary Judgment In Favor of Sanchez

The City advances four assignments of error: (a) Sanchez did not have a constitutionally protected property interest in his merit pay; (b) the grievance procedure available to Sanchez satisfied due process; (c) Sanchez waived his right to challenge the grievance procedure; and (d) Sanchez's due process claim is barred by *Parratt v. Taylor*, 451 U.S. 527 (1981). We reject these contentions.

(a) Property interest in merit pay

[1] The City argues that Sanchez had no property interest in his merit pay. "The . . . due process guarantees of the fourteenth amendment apply only when a constitutionally protected liberty or property interest is at stake." *Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). Property interests are not created by the Constitution; instead, "they are created and their dimensions are defined by

existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). In order to have a property interest in a benefit, a person must demonstrate that he or she has a legitimate claim of entitlement to it, not merely a unilateral expectation. *Id.*

[2] Sanchez correctly asserts that prior to its amendment in June 1978, Santa Ana City Charter Section 1008 (hereinafter “old Section 1008”), the grievance procedure in effect at the time Sanchez began receiving merit pay, created a constitutionally protected property interest in merit pay.

[3] A governing body does not create a property interest in a benefit merely by providing a particular procedure for the removal of that benefit. *See McGraw v. Huntington Beach*, 882 F.2d 384, 389 (9th Cir. 1989) (property cannot be defined by the procedures for its deprivation). But old Section 1008 did more than create an entitlement to an administrative appeal where a city employee’s merit pay is removed. Old Section 1008 treated a reduction in pay as a demotion, and, by providing that an employee may be demoted for certain specified reasons, implicitly restricted the City’s authority to demote an employee to the specified reasons.² *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (classified civil service employee had property interest in continued employment because a state statute provided that such

²Old Section 1008 provided in relevant part:

“Each or any of these actions relating to suspension, demotion, or dismissal may be taken by the officer having power of appointment to the position on the grounds of incompetency, inefficiency, dishonesty, misconduct, insubordination, failure to observe department or City rules or the rules and regulations as provided in this Article, or failure to cooperate reasonably with his superiors or fellow employees. . . .”

A reduction in pay shall be treated as a demotion under this Section. . . .”

employees may not be dismissed except for certain specified reasons); *cf. Hogue v. Clinton*, 791 F.2d 1318, 1324 (8th Cir.) (discharged employee had no property interest in employment where grievance procedure merely provided an avenue to appeal the discharge and did not guide or restrict the employer's decision to terminate), *cert. denied*, 479 U.S. 1008 (1986).

[4] The City argues that Sanchez did not have a property interest in his merit pay at the time it was taken away because the removal of merit pay had been excluded from Section 1008's grievance procedure pursuant to the June 1978 amendment. This amendment, however, took effect *after* Sanchez had progressed to merit step E. As the City acknowledged at oral argument, under old Section 1008, once Sanchez began receiving merit pay, it would have continued automatically absent affirmative action on the part of the City to take it away. Sanchez thus had a vested property right to merit pay at the time he began receiving merit pay under old Section 1008. The City could not arbitrarily take away Sanchez's right to continued receipt of merit pay simply by amending Section 1008. *See Olson v. Cory*, 27 Cal.3d 532, 609 P.2d 991, 164 Cal.Rptr. 217 (1980) (declaring unconstitutional the state's attempt to limit certain cost-of-living increases in judges' salaries by amending a state compensation system; the state was required to pay judges entering office prior to the amendment at the then-mandated salary level). The cases teach that Sanchez had a constitutionally protected property interest in his merit pay prior to the amendment of Section 1008.³

³The City's reliance on *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984), is misplaced. In *Veit*, we held that a federal civil service employee did not have a property interest in receiving a merit pay increase. *Id.* at 511. Here, in contrast, Sanchez had been receiving merit pay for nearly one year and, short of affirmative action on the City's part, would have continued to receive it.

(b) *Adequacy of the City's procedure*

[5] The City next contends that, even if Sanchez had a property interest in his merit pay, the procedure the City followed in removing his merit pay satisfied federal due process. The district court correctly held that the procedures the City followed did not satisfy due process.

"Whether deprivation of a property right implicates a due process right to a hearing is a matter of federal constitutional law." *Ostlund v. Bobb*, 825 F.2d 1371, 1373 (9th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988). Due process generally requires " 'that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.' " *Loudermill*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (emphasis in original).

[6] Sanchez does not contend, nor must he contend, that he should have been given a pre-removal hearing. He was entitled to an administrative appeal, or a post-removal hearing, to challenge the final decision to eliminate his merit pay. He received no hearing or an opportunity to be heard at any time.

It is undisputed that Sanchez was entitled to an administrative appeal under California law. Section 3304(b) of the state Bill of Rights Act provides that no punitive action may be taken against a police officer without providing the officer with an opportunity for an administrative appeal. *Baggett v. Gates*, 32 Cal.3d 128, 141, 649 P.2d 874, 881, 185 Cal.Rptr. 232, 239 (1982). Section 3303 defines "punitive action" to include a reduction in salary. *Id.*

*Two well-established exceptions exist: (1) where the property deprivation is the result of random and unauthorized conduct by a state employee such that meaningful predeprivation process is not possible; or (2) where protection of the public interest requires an immediate seizure of property without a hearing. See *Sorrano's Gasco*, 874 F.2d at 1317-18.

[7] Because Sanchez was never given an opportunity for a hearing of any kind to contest the removal of his merit pay,⁵ his property interest was taken without due process.

(c) *Waiver*

[8] The City next argues that Sanchez waived his right to challenge the grievance procedure on the ground that Sanchez never submitted a written memorandum to or made an appointment with Chief Davis, despite Captain Hansen's written instructions that this was the first step in the grievance procedure. The City further argues that Sanchez's March 30, 1979 memorandum to Chief Davis and April 25, 1979 memorandum to Lieutenant Jordan merely evidence an attempt to obtain information prior to instituting the grievance procedure, not an attempt to institute the grievance procedure. This argument also fails to excuse the denial of any kind of procedural review.

"A waiver of a constitutional right is 'not to be implied and is not lightly to be found.'" *Ostlund*, 825 F.2d at 1373 (quoting *United States v. Provencio*, 554 F.2d 361, 363 (9th Cir. 1977)). It must be knowing and voluntary. *Id.*

[9] The facts do not support the City's contention that Sanchez waived his right to a hearing. City Charter Section 1008, the City's grievance procedure, provides that a City employee who has suffered a pay reduction is entitled to a written statement of the charges leading to the pay reduction. In accordance with Section 1008, Sanchez attempted to invoke the grievance procedure by requesting a written statement of the charges against him in his March 31, 1979 memorandum to Chief Davis, to which Chief Davis never responded. Not surprisingly, his subsequent memos to Captain Hansen and

⁵Because Sanchez does not contend that he was entitled to a hearing prior to the removal of his merit pay, we do not reach the abstract issue of whether Sanchez was entitled to a pre-removal hearing.

Lieutenant Jordan sought to clarify the grievance procedure after Chief Davis failed to respond to Sanchez's initial memorandum invoking the grievance procedure. Sanchez has not waived his right to challenge the procedure.

(d) Parratt v. Taylor

We also reject the City's argument that *Parratt v. Taylor*, 451 U.S. 527 (1981), bars Sanchez's due process claim. Because Sanchez sought only a post-deprivation hearing and it was denied, *Parratt*, which addresses when pre-removal hearings are required, is plainly inapplicable.

The City argues for the first time in its reply brief that Sanchez's § 1983 claim against the City must fail because Sanchez did not establish that the City's policy makers acted to deprive him of due process. As a general rule, an appellant may not raise an argument for the first time in a reply brief. See *Northwood Acceptance Corp. v. Lynnwood Equipment*, 841 F.2d 918, 924 (9th Cir. 1988). The City offers no justification for departure from this rule, and we therefore decline to address its argument.

II. *The Damage Award*

[10] The City challenges the jury's verdict granting Sanchez \$400,000 in lost income and \$500,000 for emotional distress on the following grounds: (a) the City's single act of removing Sanchez's merit pay cannot constitute constructive discharge as a matter of law; (b) damages for emotional distress were barred by Sanchez's state workers' compensation award; and (c) it was prejudicial error for the district court to refuse to instruct the jury that a directed verdict had been entered in the City's favor on all of Sanchez's other claims. We affirm the damage award for lost income but vacate the award for emotional distress.

(a) *Constructive discharge*

The City contends that the removal of Sanchez's merit pay, standing alone, is insufficient as a matter of law to support a finding of constructive discharge because a single, isolated incident of employment discrimination is insufficient to establish constructive discharge. We reject this contention.

An employee who resigns, as Sanchez did, cannot secure backpay unless his employer constructively discharged him. *Satterwhite v. Smith*, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984). "A constructive discharge occurs when, looking at the totality of the circumstances, 'a reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.'" *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)(quoting *Satterwhite*, 744 F.2d at 1381).

Whether working conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question for the jury. *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989). In general, however, a single isolated incident is insufficient as a matter of law to support a finding of constructive discharge. *Watson*, 823 F.2d at 361. Thus, a plaintiff alleging a constructive discharge must show some " 'aggravating factors,' such as a 'continuous pattern of discriminatory treatment.'" *Satterwhite*, 744 F.2d at 1382 (quoting *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981)).

The removal of Sanchez's merit pay coupled with the attending aggravating factors in the record permitted a trier of fact to conclude that a reasonable person would have felt compelled to quit. The removal of Sanchez's merit pay is more properly viewed as two discrete incidents. Sanchez lost his merit step E pursuant to a negative evaluation prepared by Sergeant Collins, Sanchez's immediate supervisor. He lost

his merit pay step D pursuant to Captain Hansen's recommendation to Chief Davis.

Moreover, significant aggravating factors were present. Sanchez lost his merit pay step E on the same day that he left work suffering from a stress reaction. His merit pay step D was removed while he was on an approved medical leave of absence. Most significantly, Sanchez's repeated attempts to invoke the grievance procedure were rebuffed.

(b) *The state worker's compensation award*

[11] The City contends that Sanchez's claim in federal court for emotional distress is barred under res judicata principles by his state workers' compensation award. On this point the City prevails.

Sanchez had previously filed two claims with the California Workers' Compensation Appeals Board for emotional injuries arising out of the loss of his merit pay. Pursuant to the parties' stipulation, the appeals board found that Sanchez's stress-related injuries caused a permanent disability of 30½% and awarded him \$8,662.50 for the period between the City's removal of Sanchez's merit pay in March 1979 and Sanchez's medical leave of absence in May 1979. The appeals board further determined that it lacked the authority to award pay during Sanchez's leave of absence and that his resignation on September 10, 1979 precluded his claim for entitlement to further benefits.

Preliminarily, we reject Sanchez's contention that the City has waived its right to assert res judicata. Res judicata is an affirmative defense and is ordinarily waived if not specially pleaded. Fed. R. Civ. P. 8(c); *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984). "[A] preclusion defense that arises after the pleadings have been filed can be raised only by a motion for leave to file a supplemental answer under [Federal Rule of Civil Procedure] 15(d)." *Id.* We liberally

construe such attempts to raise the defense as motions for leave to file a supplemental answer. *Id.*

The City could not have raised a preclusion defense in its August 14, 1980 answer because Sanchez did not receive the compensation award until November 12, 1981. The City raised the issue in its "Brief re. Allowable Damages" in October 1985. While considerable time had passed since the date of the award, the City did raise the issue prior to the trial on damages, thus giving Sanchez "notice of the plea of estoppel and a chance to argue . . . why the imposition of an estoppel would be inappropriate." *Id.* (quoting *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 350 (1971)). We therefore hold that the City has not waived its right to assert preclusion of that claim.

Whether Sanchez's compensation award for emotional injuries bars under res judicata principles his section 1983 claim for damages for emotional distress is answered by state law. *See Eilrich v. Remas*, 839 F.2d 630, 632 (9th Cir.), *cert. denied*, — U.S. —, 109 S. Ct. 60 (1988).

California law provides that if an employee's injuries are compensable under the Workers' Compensation Act, the benefits provided thereunder constitute the exclusive remedy against the employer. *See Cal. Labor Code § 3601; Hollywood Refrigeration Sales Co., Inc. v. Superior Court*, 164 Cal.App.3d 754, 757, 210 Cal.Rptr. 619, 620 (1985). Work-related emotional injuries are fully compensable under the Workers' Compensation Act, *Giorgi v. Verdugo Hills Hospital*, 210 Cal. App. 3d 252, 272 (1989). Indeed, Sanchez has already recovered damages under the workers' compensation system for his emotional injuries. We therefore vacate the jury's damage award of \$500,000 for emotional distress.⁶

⁶The City also contends that there was insufficient evidence to establish that the jury's award of damages for emotional distress stemmed from the due process violation. Because we vacate the award of damages for emotional distress on other grounds, it is unnecessary to address this contention.

(c) *Directed verdict*

The City contends that the district court erred by not instructing the jury that a directed verdict had been entered in the City's favor on all of Sanchez's claims except for the due process violation. This error was prejudicial, the City argues, because by failing to indicate that a directed verdict had been entered in the City's favor, the district court implicitly "gave the impression that it was finding against the City regarding the claims alleged over the 39 days [of trial]." Appellee's Brief at 18. We find no error.

The district court has wide latitude in tailoring jury instructions. *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). We view jury instructions as a whole, and examine them to determine whether they "fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Id.* An error in instructing the jury does not require reversal if it is more probably than not harmless. *Course v. A.H. Robins Co. Inc.*, 764 F.2d 1329, 1337 (9th Cir.), *modified*, 773 F.2d 1049 (9th Cir. 1985).

The district court had no duty to inform the jury that a directed verdict had been entered in the City's favor on counts that were not being submitted. The only issue before the jury was the scope, nature, and amount of damages on Sanchez's § 1983 due process claim; liability had already been fixed by the district court's earlier partial summary judgment order. The district court permitted Sanchez's counsel to read the order granting partial summary judgment, thus focusing the jury's attention on the issue of damages on the due process claim. Considering the jury instructions as a whole, we conclude that the district court did not commit prejudicial error in failing to inform the jury that a directed verdict had been entered on claims not properly before the jury.⁷

⁷The City similarly argues that the district court gave the impression that the plaintiffs' claims had survived by allowing Caro and Torres, Sanchez's

We therefore affirm the summary judgment on Sanchez's due process claim. We affirm the jury's damage award for lost income. We vacate the damage award for emotional distress. Neither party is entitled to costs or attorney fees on appeal.

AFFIRMED IN PART; VACATED IN PART.

co-plaintiffs on other discrimination claims, to sit at the counsel table with Sanchez. The district court, however, clearly informed the jury that the only issue before it was the damages stemming from the procedural due process violation.

Appendix A.19



APPENDIX B

APPENDIX B

REPRINTED WITH CORRECTIONS JULY 30, 1990

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,

Plaintiffs-Appellees,

v.

CITY OF SANTA ANA,

Defendant-Appellant,

and

CITY OF SANTA ANA POLICE
DEPARTMENT; DON BOTTS;
RAYMOND C. DAVIS; E. B. HANSEN;
ROBERT STEBBENS; NORWOOD
WILLIAMS; LEE DRUMMOND;
LAWRENCE PITZER; MICHAEL
LLEWELLYN; DALE STERZER; GARY
DIXON; JOHN COLLINS; JOHN
McDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN McCLAIN,
Defendants.

Nos. 86-6386
88-5855

D.C. No.
CV-79-1818-KN

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,

Plaintiffs-Appellees,

v.

CITY OF SANTA ANA,

Defendant,

and

NORWOOD WILLIAMS; LEE
DRUMMOND; LAWRENCE PITZER;
MICHAEL LLEWELLYN; DALE
STERZER; GARY DIXON; JOHN
COLLINS; JOHN McDANIELS;
MICHAEL LANNERS; WILLIAM BRUNS;
JOHN DITTUS; RICHARD FAUST;
JOHN McCLAIN,

Defendants-Appellants.

No. 88-5827

ORDER

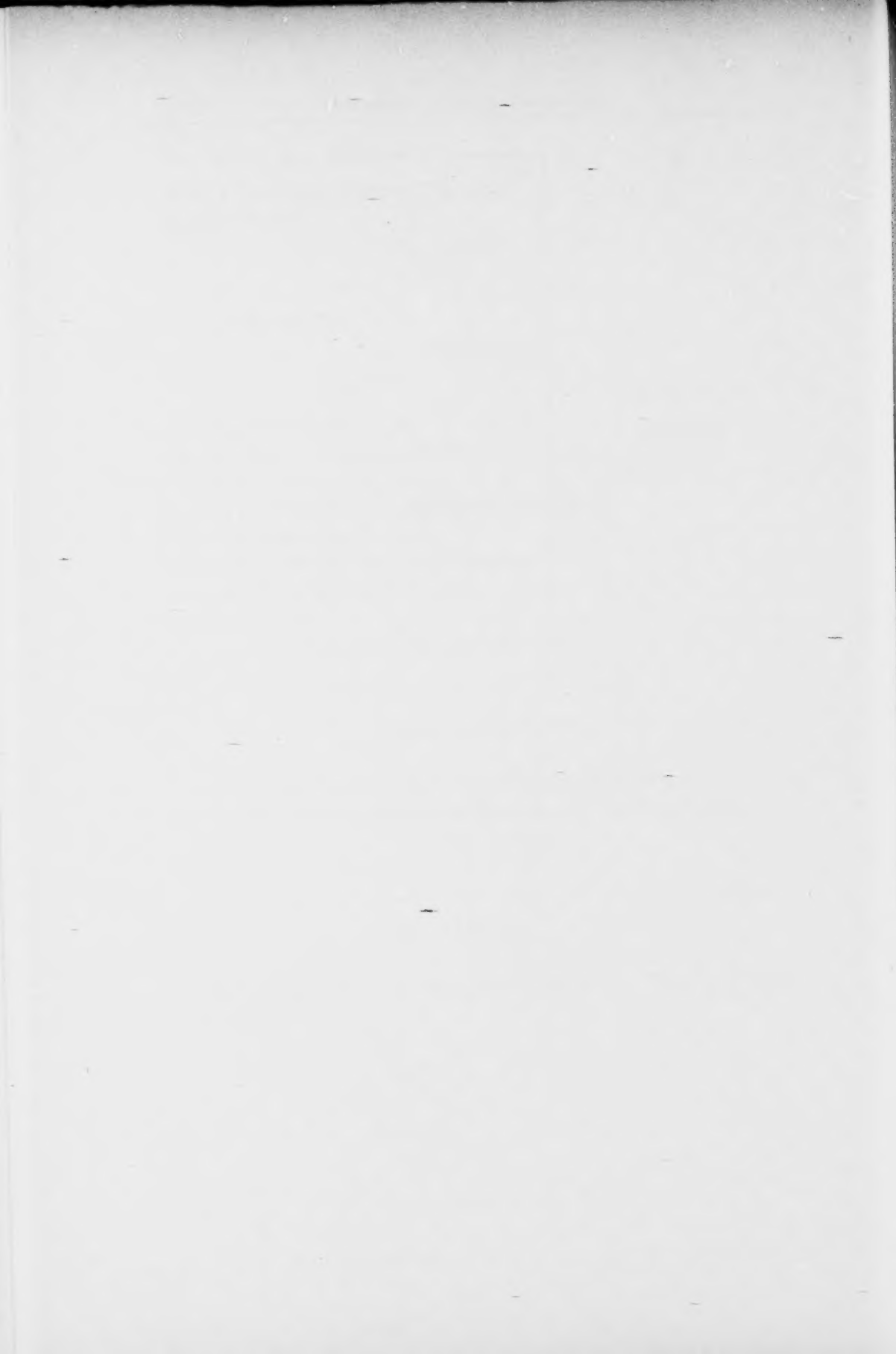
Filed July 16, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

ORDER

The opinion filed in this case on July 11, 1990 is WITH-
DRAWN.

APPENDIX C



**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,

Plaintiffs-Appellees,

v.

CITY OF SANTA ANA,

Defendant-Appellant,

and

CITY OF SANTA ANA POLICE
DEPARTMENT; DON BOTTS;
RAYMOND C. DAVIS; E. B. HANSEN;
ROBERT STEBBENS; NORWOOD
WILLIAMS; LEE DRUMMOND;
LAWRENCE PITZER; MICHAEL
LLEWELLYN; DALE STERZER; GARY
DIXON; JOHN COLLINS; JOHN
McDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN McCLAIN,
Defendants.

Nos. 86-6386
88-5855

D.C. No.
CV-79-1818-KN

Filed July 20, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and
Diarmuid F. O'Scannlain,
Circuit Judges.

ORDER

By August 3, 1990, the parties shall file supplemental briefs, not exceeding 20 pages, on the effect of the California Supreme Court's depublication of Giorgi v. Verdugo Hills Hospital, 210 Cal.App.3d 252 (1989).

APPENDIX D

FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellees,

v.

CITY OF SANTA ANA,
Defendant-Appellant,
and

CITY OF SANTA ANA POLICE
DEPARTMENT; DON BOTTS;
RAYMOND C. DAVIS; E. B. HANSEN;
ROBERT STEBBENS; NORWOOD
WILLIAMS; LEE DRUMMOND;
LAWRENCE PITZER; MICHAEL
LLEWELLYN; DALE STERZER; GARY
DIXON; JOHN COLLINS; JOHN
MCDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN MCCLAIN,
Defendants.

Nos. 86-6336
88-5855

D.C. No.
CV-79-1818-KN

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellees,

v.

CITY OF SANTA ANA,
Defendant,

and

ROBERT STEBBENS; NORWOOD
WILLIAMS; LEE DRUMMOND;
LAWRENCE PITZER; MICHAEL
LLEWELLYN; DALE STERZER; GARY
DIXON; JOHN COLLINS; JOHN
McDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN McCLAIN,
Defendants-Appellants.

No. 88-5827
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Opinion Filed July 11, 1990
Opinion Withdrawn July 16, 1990

Filed September 25, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

*Judge Irving Hill, District Judge for the Central District of California,
presided over many of the pretrial orders.

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law/Damages

Affirming in part and vacating in part a district court judgment, the court of appeals held that a city's failure to provide an administrative appeal, or post-removal hearing, to a former police officer to challenge a final decision to eliminate his merit pay violated the officer's due process rights.

Jesse J. Sanchez was hired by appellant City of Santa Ana Police Department under a program for recruiting Spanish-speaking officers. Although at first Sanchez received several merit pay increases for meritorious performance, later his merit step increases were removed for allegedly performing "below job standards." One of his merit steps was removed while he left work claiming emotional illness. The Chief of Police approved the removal of Sanchez's merit steps, and did not respond to Sanchez's written requests about information concerning the grievance procedure. Sanchez was never informed of the City's grievance procedure, which granted the right to a hearing before the Santa Ana Personnel Board. However, in 1978, an amendment to the City Charter removed merit pay reductions from its grievance procedure coverage. After a four-month approved medical leave of absence, followed by the City's refusal to restore his merit pay, Sanchez resigned. The district court granted summary judgment for Sanchez on his due process claim. Following a trial on the issue of damages, a jury determined that the due process violation was a constructive discharge and awarded Sanchez monetary damages for lost income and emotional distress.

[1] The court agreed with Sanchez's claim that the grievance procedure in effect at the time Sanchez began receiving

merit pay created a constitutionally protected property interest in merit pay. [2] Thus, the old Charter provision created an entitlement to an administrative appeal when a city employee's merit pay was removed. [3] The City could not arbitrarily take away Sanchez's right to continued receipt of merit pay simply by amending that section. [4] Because under California law Sanchez was entitled to an administrative appeal in which to challenge the final decision to eliminate his merit pay, failure by the City to provide a hearing of any kind to contest this removal resulted in a taking of Sanchez's property interest without due process. [5] The facts did not support the City's position that Sanchez waived his right to a hearing. Sanchez's invocation of the applicable grievance procedure went unanswered by the Police Chief and Sanchez's supervisors. [6] The removal of Sanchez's merit pay, coupled with the attending aggravating factors of intolerable and discriminatory working conditions, permitted the trier of fact to find constructive discharge by concluding that a reasonable person would have felt compelled to quit. [7] However, the City was correct that Sanchez's federal claim for emotional distress was barred under res judicata principles by his state workers' compensation award. [8] Under California law, if an employee's injuries are compensable under the Workers' Compensation Act, the benefits provided constitute the exclusive remedy against the employer. Because Sanchez recovered damages for his emotional injuries under the Act, the court vacated the jury's damage award for emotional distress. [9] The district court did not commit prejudicial error in failing to inform the jury that a directed verdict was entered on Sanchez's due process claim. The only issue before the jury was the scope, nature, and amount of damages on Sanchez's claim.

COUNSEL

Charles Matheis, Jr., Beam & Brobeck, Santa Ana, California, for the defendants-appellants.

Meir J. Westreich, Glendale, California, for the plaintiffs-appellees.

OPINION

GOODWIN, Chief Judge:

The City of Santa Ana appeals the district court's summary judgment in favor of former city police officer Jesse J. Sanchez on his claim under 42 U.S.C. § 1983 that the City violated his due process rights in removing his merit pay. The City also appeals the jury's damage award of \$400,000 in lost wages and \$500,000 for emotional distress.¹ We have jurisdiction under 28 U.S.C. § 1291, and we affirm the summary judgment and affirm in part and vacate in part the damage award.

The City of Santa Ana Police Department hired Sanchez in late 1975 pursuant to a program to recruit Spanish-speaking officers. His salary was initially set at step C, the base salary for police officers hired from other police departments as lateral transfers. By April 1, 1978, Sanchez had progressed to merit step E, the highest salary step, which is awarded on the basis of meritorious performance.

In February 1979, defendant Sergeant Collins, Sanchez's supervisor, prepared an annual performance review recommending that Sanchez's merit step E be removed because he was performing "below job standards." Excerpts of Record [ER] at 701-703. No action was taken at that time.

¹This opinion addresses the City's appeal from the summary judgment and damage award in favor of Sanchez. The appeal of Sanchez and the other two former police officers involved in this suit is addressed in *Sanchez v. City of Santa Ana*, Nos. 85-6504, 86-6226, 87-5614, 88-5853, slip op. 7001 (9th Cir. July 11, 1990).

On March 14, 1979, defendant Captain Hansen submitted a memorandum to Chief of Police Davis recommending that Sanchez's merit step D be removed because of two disciplinary suspension recommendations from Sanchez's supervisors, Sergeant Collins and Lieutenant Williams. At the conclusion of the recommendation, Captain Hansen wrote: "This action should not be considered disciplinary. It is intended as an action based on substandard job performance." ER at 910-11.

On March 15, 1979, Sanchez left work during roll call, claiming emotional illness. Later that same day, his merit step E was formally removed, retroactive to March 1, 1979.

On March 26, 1979, Chief Davis approved in writing the removal of Sanchez's merit step D, effective April 1, 1979.

In a March 30, 1979 memorandum to Chief Davis, Sanchez indicated that he wished to contest the removal of his merit pay, and requested a written statement of the charges against him. Captain Hansen responded to Sanchez's memorandum, stating that the removal of his merit pay was not based on any specific charges against him other than a failure to perform at a level justifying merit pay. He further advised Sanchez that he could challenge the removal by arranging for an interview with Chief Davis or by relying on his written memorandum. It is undisputed that Chief Davis never responded to Sanchez's memorandum.

In an April 13, 1979 memorandum to Captain Hansen, Sanchez reiterated his request for a statement of the charges upon which the removal of his merit pay was based, because without such a statement he did "not know how to respond to the pay reductions in the grievance procedure." ER at 927. Captain Hansen again informed Sanchez that the removal of his merit pay was based solely upon his substandard performance, that he should submit a written grievance to, or request an interview with, Chief Davis, and that he could

obtain further clarification of the grievance procedure from Lieutenant Jordan.

In an April 25, 1979 memorandum to Lieutenant Jordan, Sanchez requested an explanation of the procedure the department had followed in removing merit pay and of the grievance procedure to challenge its removal. He indicated that he wished to pursue the grievance procedure, but first wanted to understand the complete procedure. Lieutenant Jordan informed him that Santa Ana City Council Resolution 58-281 covered the procedure the department had used in removing Sanchez's merit pay and that Section 10.77 of the Santa Ana Police Department's Rules and Regulations covered the grievance procedure to challenge its removal. Resolution 58-281 provides that an officer's merit pay may be removed upon the recommendation of the head of the police department and the approval of the City Manager. Section 10.77 permits an employee to present grievances concerning adverse personnel action through channels up to and including the Chief of Police. Lieutenant Jordan's letter made no reference to the City's grievance procedure, Santa Ana City Charter Section 1008, which grants the right to a hearing before the Santa Ana Personnel Board.

Beginning on May 6, 1989, Sanchez took a four-month medical leave of absence. By letter dated September 6, 1979, Sanchez advised the City that his doctor had conditionally released him to return to work. He requested information concerning his new work assignment, which the City provided the same day.

By letter dated September 10, 1979, Sanchez alleged that the removal of his merit pay was a demotion and a continuing pattern of discrimination which had caused him to suffer a stress reaction. He indicated that he would return to work only if his merit pay were restored.

Lieutenant Jordan phoned Sanchez on behalf of the City and denied his request for immediate restoration of his merit

pay. Sanchez thereafter submitted a letter of resignation effective September 10, 1979.

Sanchez and two other former police officers filed in federal district court a complaint for damages and injunctive relief against the City, Chief Davis, and other named members of the department. The complaint alleged that the City had removed Sanchez's merit pay without due process of law, that Sanchez had been constructively discharged from his job, and that, as a result of emotional distress, he suffered from a work-related disability.

On February 7, 1983, the defendants filed a motion in limine, seeking in part a declaration that Santa Ana City Charter Section 1008, as amended, (the City's grievance procedure) was constitutional. Prior to its amendment in June 1978, Section 1008 granted to City employees whose pay had been reduced the right to a written statement of the charges leading to the pay reduction and the right to a hearing before the Santa Ana Personnel Board. The June 1978 amendment removed merit pay reductions from the coverage of Section 1008.

Sanchez responded by moving for summary judgment. He argued that the amended Section 1008 could not be applied retroactively to him because he had begun receiving merit pay prior to the effective date of the amendment, and that he had a property interest in his merit pay which could not be taken away without due process.

On June 3, 1983, the district court granted partial summary judgment in favor of Sanchez and against the City and Chief Davis on Sanchez's due process claim. The court concluded that the City had denied Sanchez due process in removing his merit pay, and that the denial of due process was a proper claim under 42 U.S.C. § 1983. The court subsequently exonerated Chief Davis of personal liability and reserved for trial

the issue of the scope, nature and amount of damages against the City.

Following a trial on the issue of damages, the jury determined that the due process violation constituted a constructive discharge, and awarded Sanchez \$400,000 in lost income and \$500,000 for emotional distress. After the City's post-trial motions were denied, the City brought this appeal.

I. *The Summary Judgment In Favor of Sanchez*

The City advances four assignments of error: (a) Sanchez did not have a constitutionally protected property interest in his merit pay; (b) the grievance procedure available to Sanchez satisfied due process; (c) Sanchez waived his right to challenge the grievance procedure; and (d) Sanchez's due process claim is barred by *Parratt v. Taylor*, 451 U.S. 527 (1981). We reject these contentions.

(a) *Property interest in merit pay*

The City argues that Sanchez had no property interest in his merit pay. "The . . . due process guarantees of the fourteenth amendment apply only when a constitutionally protected liberty or property interest is at stake." *Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1316 (9th Cir. 1989). Property interests are not created by the Constitution; instead, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). In order to have a property interest in a benefit, a person must demonstrate that he or she has a legitimate claim of entitlement to it, not merely a unilateral expectation. *Id.*

[1] Sanchez correctly asserts that prior to its amendment in June 1978, Santa Ana City Charter Section 1008 (hereinafter

"old Section 1008"), the grievance procedure in effect at the time Sanchez began receiving merit pay, created a constitutionally protected property interest in merit pay.

[2] A governing body does not create a property interest in a benefit merely by providing a particular procedure for the removal of that benefit. *See McGraw v. Huntington Beach*, 882 F.2d 384, 389 (9th Cir. 1989) (property cannot be defined by the procedures for its deprivation). But old Section 1008 did more than create an entitlement to an administrative appeal where a city employee's merit pay is removed. Old Section 1008 treated a reduction in pay as a demotion, and, by providing that an employee may be demoted for certain specified reasons, implicitly restricted the City's authority to demote an employee to the specified reasons.² *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39 (1985) (classified civil service employee had property interest in continued employment because a state statute provided that such employees may not be dismissed except for certain specified reasons); *cf. Hogue v. Clinton*, 791 F.2d 1318, 1324 (8th Cir.) (discharged employee had no property interest in employment where grievance procedure merely provided an avenue to appeal the discharge and did not guide or restrict the employer's decision to terminate), *cert. denied*, 479 U.S. 1008 (1986).

[3] The City argues that Sanchez did not have a property interest in his merit pay at the time it was taken away because the removal of merit pay had been excluded from Section

²Old Section 1008 provided in relevant part:

"Each or any of these actions relating to suspension, demotion, or dismissal may be taken by the officer having power of appointment to the position on the grounds of incompetency, inefficiency, dishonesty, misconduct, insubordination, failure to observe department or City rules or the rules and regulations as provided in this Article, or failure to cooperate reasonably with his superiors or fellow employees. . . ."

A reduction in pay shall be treated as a demotion under this Section. . . ."

1008's grievance procedure pursuant to the June 1978 amendment. This amendment, however, took effect *after* Sanchez had progressed to merit step E. As the City acknowledged at oral argument, under old Section 1008, once Sanchez began receiving merit pay, it would have continued automatically absent affirmative action on the part of the City to take it away. Sanchez thus had a vested property right to merit pay at the time he began receiving merit pay under old Section 1008. The City could not arbitrarily take away Sanchez's right to continued receipt of merit pay simply by amending Section 1008. *See Olson v. Cory*, 27 Cal.3d 532, 609 P.2d 991, 164 Cal.Rptr. 217 (1980) (declaring unconstitutional the state's attempt to limit certain cost-of-living increases in judges' salaries by amending a state compensation system; the state was required to pay judges entering office prior to the amendment at the then-mandated salary level). The cases teach that Sanchez had a constitutionally protected property interest in his merit pay prior to the amendment of Section 1008.³

(b) *Adequacy of the City's procedure*

The City next contends that, even if Sanchez had a property interest in his merit pay, the procedure the City followed in removing his merit pay satisfied federal due process. The district court correctly held that the procedures the City followed did not satisfy due process.

"Whether deprivation of a property right implicates a due process right to a hearing is a matter of federal constitutional law." *Ostlund v. Bobb*, 825 F.2d 1371, 1373 (9th Cir. 1987),

³The City's reliance on *Veit v. Heckler*, 746 F.2d 508 (9th Cir. 1984), is misplaced. In *Veit*, we held that a federal civil service employee did not have a property interest in receiving a merit pay increase. *Id.* at 511. Here, in contrast, Sanchez had been receiving merit pay for nearly one year and, short of affirmative action on the City's part, would have continued to receive it.

cert. denied, 486 U.S. 1033 (1988). Due process generally requires “‘that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest.’”⁴ *Loudermill*, 470 U.S. at 542 (quoting *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971)) (emphasis in original).

Sanchez does not contend, nor must he contend, that he should have been given a pre-removal hearing. He was entitled to an administrative appeal, or a post-removal hearing, to challenge the final decision to eliminate his merit pay. He received no hearing or an opportunity to be heard at any time.

[4] It is undisputed that Sanchez was entitled to an administrative appeal under California law. Section 3304(b) of the state Bill of Rights Act provides that no punitive action may be taken against a police officer without providing the officer with an opportunity for an administrative appeal. *Baggett v. Gates*, 32 Cal.3d 128, 141, 649 P.2d 874, 881, 185 Cal.Rptr. 232, 239 (1982). Section 3303 defines “punitive action” to include a reduction in salary. *Id.*

Because Sanchez was never given an opportunity for a hearing of any kind to contest the removal of his merit pay,⁵ his property interest was taken without due process.

(c) *Waiver*

The City next argues that Sanchez waived his right to challenge the grievance procedure on the ground that Sanchez

⁴Two well-established exceptions exist: (1) where the property deprivation is the result of random and unauthorized conduct by a state employee such that meaningful predeprivation process is not possible; or (2) where protection of the public interest requires an immediate seizure of property without a hearing. See *Sorrano's Gasco*, 874 F.2d at 1317-18.

⁵Because Sanchez does not contend that he was entitled to a hearing prior to the removal of his merit pay, we do not reach the abstract issue of whether Sanchez was entitled to a pre-removal hearing.

never submitted a written memorandum to or made an appointment with Chief Davis, despite Captain Hansen's written instructions that this was the first step in the grievance procedure. The City further argues that Sanchez's March 30, 1979 memorandum to Chief Davis and April 25, 1979 memorandum to Lieutenant Jordan merely evidence an attempt to obtain information prior to instituting the grievance procedure, not an attempt to institute the grievance procedure. This argument also fails to excuse the denial of any kind of procedural review.

"A waiver of a constitutional right is 'not to be implied and is not lightly to be found.'" *Ostlund*, 825 F.2d at 1373 (quoting *United States v. Provencio*, 554 F.2d 361, 363 (9th Cir. 1977)). It must be knowing and voluntary. *Id.*

[5] The facts do not support the City's contention that Sanchez waived his right to a hearing. City Charter Section 1008, the City's grievance procedure, provides that a City employee who has suffered a pay reduction is entitled to a written statement of the charges leading to the pay reduction. In accordance with Section 1008, Sanchez attempted to invoke the grievance procedure by requesting a written statement of the charges against him in his March 31, 1979 memorandum to Chief Davis, to which Chief Davis never responded. Not surprisingly, his subsequent memos to Captain Hansen and Lieutenant Jordan sought to clarify the grievance procedure after Chief Davis failed to respond to Sanchez's initial memorandum invoking the grievance procedure. Sanchez has not waived his right to challenge the procedure.

(d) *Parratt v. Taylor*

We also reject the City's argument that *Parratt v. Taylor*, 451 U.S. 527 (1981), bars Sanchez's due process claim. Because Sanchez sought only a post-deprivation hearing and it was denied, *Parratt*, which addresses when pre-removal hearings are required, is plainly inapplicable.

The City argues for the first time in its reply brief that Sanchez's § 1983 claim against the City must fail because Sanchez did not establish that the City's policy makers acted to deprive him of due process. As a general rule, an appellant may not raise an argument for the first time in a reply brief. See *Northwood Acceptance Corp. v. Lynnwood Equipment*, 841 F.2d 918, 924 (9th Cir. 1988). The City offers no justification for departure from this rule, and we therefore decline to address its argument.

II. *The Damage Award*

The City challenges the jury's verdict granting Sanchez \$400,000 in lost income and \$500,000 for emotional distress on the following grounds: (a) the City's single act of removing Sanchez's merit pay cannot constitute constructive discharge as a matter of law; (b) damages for emotional distress were barred by Sanchez's state workers' compensation award; and (c) it was prejudicial error for the district court to refuse to instruct the jury that a directed verdict had been entered in the City's favor on all of Sanchez's other claims. We affirm the damage award for lost income but vacate the award for emotional distress.

(a) *Constructive discharge*

The City contends that the removal of Sanchez's merit pay, standing alone, is insufficient as a matter of law to support a finding of constructive discharge because a single, isolated incident of employment discrimination is insufficient to establish constructive discharge. We reject this contention.

An employee who resigns, as Sanchez did, cannot secure backpay unless his employer constructively discharged him. *Satterwhite v. Smith*, 744 F.2d 1380, 1381 n.1 (9th Cir. 1984). "A constructive discharge occurs when, looking at the totality of the circumstances, 'a reasonable person in [the employee's] position would have felt that he was forced to quit because of

intolerable and discriminatory working conditions.' " *Watson v. Nationwide Ins. Co.*, 823 F.2d 360, 361 (9th Cir. 1987)(quoting *Satterwhite*, 744 F.2d at 1381).

Whether working conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign is normally a factual question for the jury. *Thomas v. Douglas*, 877 F.2d 1428, 1434 (9th Cir. 1989). In general, however, a single isolated incident is insufficient as a matter of law to support a finding of constructive discharge. *Watson*, 823 F.2d at 361. Thus, a plaintiff alleging a constructive discharge must show some " 'aggravating factors,' such as a 'continuous pattern of discriminatory treatment.' " *Satterwhite*, 744 F.2d at 1382 (quoting *Clark v. Marsh*, 665 F.2d 1168, 1174 (D.C. Cir. 1981)).

[6] The removal of Sanchez's merit pay coupled with the attending aggravating factors in the record permitted a trier of fact to conclude that a reasonable person would have felt compelled to quit. The removal of Sanchez's merit pay is more properly viewed as two discrete incidents. Sanchez lost his merit step E pursuant to a negative evaluation prepared by Sergeant Collins, Sanchez's immediate supervisor. He lost his merit pay step D pursuant to Captain Hansen's recommendation to Chief Davis.

Moreover, significant aggravating factors were present. Sanchez lost his merit pay step E on the same day that he left work suffering from a stress reaction. His merit pay step D was removed while he was on an approved medical leave of absence. Most significantly, Sanchez's repeated attempts to invoke the grievance procedure were rebuffed.

(b) *The state worker's compensation award*

[7] The City contends that Sanchez's claim in federal court for emotional distress is barred under res judicata principles

by his state workers' compensation award. On this point the City prevails.

Sanchez had previously filed two claims with the California Workers' Compensation Appeals Board for emotional injuries arising out of the loss of his merit pay. Pursuant to the parties' stipulation, the appeals board found that Sanchez's stress-related injuries caused a permanent disability of 30% and awarded him \$8,662.50 for the period between the City's removal of Sanchez's merit pay in March 1979 and Sanchez's medical leave of absence in May 1979. The appeals board further determined that it lacked the authority to award pay during Sanchez's leave of absence and that his resignation on September 10, 1979 precluded his claim for entitlement to further benefits.

Preliminarily, we reject Sanchez's contention that the City has waived its right to assert *res judicata*. *Res judicata* is an affirmative defense and is ordinarily waived if not specially pleaded. Fed. R. Civ. P. 8(c); *Harbeson v. Parke Davis, Inc.*, 746 F.2d 517, 520 (9th Cir. 1984). "[A] preclusion defense that arises after the pleadings have been filed can be raised only by a motion for leave to file a supplemental answer under [Federal Rule of Civil Procedure] 15(d)." *Id.* We liberally construe such attempts to raise the defense as motions for leave to file a supplemental answer. *Id.*

The City could not have raised a preclusion defense in its August 14, 1980 answer because Sanchez did not receive the compensation award until November 12, 1981. The City raised the issue in its "Brief re. Allowable Damages" in October 1985. While considerable time had passed since the date of the award, the City did raise the issue prior to the trial on damages, thus giving Sanchez "notice of the plea of estoppel and a chance to argue . . . why the imposition of an estoppel would be inappropriate." *Id.* (quoting *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S.

313, 350 (1971)). We therefore hold that the City has not waived its right to assert preclusion of that claim.

Whether Sanchez's compensation award for emotional injuries bars under *res judicata* principles his section 1983 claim for damages for emotional distress is answered by state law. See *Eilrich v. Remas*, 839 F.2d 630, 632 (9th Cir.), *cert. denied*, — U.S. —, 109 S. Ct. 60 (1988).

[8] California law provides that if an employee's injuries are compensable under the Workers' Compensation Act, the benefits provided thereunder constitute the exclusive remedy against the employer. See Cal. Labor Code § 3601; *Hollywood Refrigeration Sales Co., Inc. v. Superior Court*, 164 Cal.App.3d 754, 757, 210 Cal.Rptr. 619, 620 (1985). Here, Sanchez has already recovered damages under the workers' compensation system for his emotional injuries. We therefore vacate the jury's damage award of \$500,000 for emotional distress.⁶

(c) *Directed verdict*

The City contends that the district court erred by not instructing the jury that a directed verdict had been entered in the City's favor on all of Sanchez's claims except for the due process violation. This error was prejudicial, the City argues, because by failing to indicate that a directed verdict had been entered in the City's favor, the district court implicitly "gave the impression that it was finding against the City regarding the claims alleged over the 39 days [of trial]." Appellee's Brief at 18. We find no error.

The district court has wide latitude in tailoring jury instruc-

⁶The City also contends that there was insufficient evidence to establish that the jury's award of damages for emotional distress stemmed from the due process violation. Because we vacate the award of damages for emotional distress on other grounds, it is unnecessary to address this issue.

tions. *Thorsted v. Kelly*, 858 F.2d 571, 573 (9th Cir. 1988). We view jury instructions as a whole, and examine them to determine whether they "fairly and adequately covered the issues presented, correctly stated the law, and were not misleading." *Id.* An error in instructing the jury does not require reversal if it is more probably than not harmless. *Course v. A.H. Robins Co. Inc.*, 764 F.2d 1329, 1337 (9th Cir.), *modified*, 773 F.2d 1049 (9th Cir. 1985).

[9] The district court had no duty to inform the jury that a directed verdict had been entered in the City's favor on counts that were not being submitted. The only issue before the jury was the scope, nature, and amount of damages on Sanchez's § 1983 due process claim; liability had already been fixed by the district court's earlier partial summary judgment order. The district court permitted Sanchez's counsel to read the order granting partial summary judgment, thus focusing the jury's attention on the issue of damages on the due process claim. Considering the jury instructions as a whole, we conclude that the district court did not commit prejudicial error in failing to inform the jury that a directed verdict had been entered on claims not properly before the jury.⁷

We therefore affirm the summary judgment on Sanchez's due process claim. We affirm the jury's damage award for lost income. We vacate the damage award for emotional distress. Neither party is entitled to costs or attorney fees on appeal.

AFFIRMED IN PART; VACATED IN PART.

⁷The City similarly argues that the district court gave the impression that the plaintiffs' claims had survived by allowing Caro and Torres, Sanchez's co-plaintiffs on other discrimination claims, to sit at the counsel table with Sanchez. The district court, however, clearly informed the jury that the only issue before it was the damages stemming from the procedural due process violation.

APPENDIX E



**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,

Plaintiffs-Appellees,

v.

CITY OF SANTA ANA,

Defendant-Appellant,

and

CITY OF SANTA ANA POLICE
DEPARTMENT; DON BOTTS;
RAYMOND C. DAVIS; E. B. HANSEN;
ROBERT STEBBENS; NORWOOD
WILLIAMS; LEE DRUMMOND;
LAWRENCE PITZER; MICHAEL
LLEWELLYN; DALE STERZER; GARY
DIXON; JOHN COLLINS; JOHN
McDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN McCLAIN,

Defendants.

Nos. 86-6386

88-5855

D.C. No.

CV-79-1818-KN

Filed February 22, 1991

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and
Diarmuid F. O'Scannlain,
Circuit Judges.

ORDER

The panel has voted unanimously to deny the petitions for rehearing. Judges Schroeder and O'Scannlain have voted to reject the suggestions for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35(b).

The petitions for rehearing are DENIED and the suggestions for rehearing en banc are REJECTED.

APPENDIX F



FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellants,
v.

CITY OF SANTA ANA; CITY OF SANTA
ANA POLICE DEPARTMENT; DON
BOTTS; RAYMOND C. DAVIS; E. B.
HANSEN; ROBERT STEBBENS;
NORWOOD WILLIAMS; LEE
DRUMMOND; LAWRENCE PITZER;
MICHAEL LEWELLEN; DALE STERZER;
GARY DIXON; JOHN COLLINS; JOHN
MCDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN MCCLAIN,
Defendants-Appellees.

Nos. 85-6504,
86-6226, 87-5614,
88-5853

D.C. No.
CV-79-1818-KN
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Filed July 11, 1990

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

*Judge Irving Hill, District Judge for the Central District of California,
presided over many of the pretrial orders.

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law

Affirming in part, reversing in part, and remanding judgments of the district court, the court of appeals held that summary judgment in favor of the City of Santa Ana was improper because the district court misapplied *League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976), to former police officers' claims of discriminatory lateral promotion policies.

Appellants Jesse Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department, appealed district court judgments in their action against the City of Santa Ana and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a).

[1] Appellants claimed that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. [2] F.R. Civ. P. 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. [3] The district court did not abuse its discretion in denying access to these files. While appellants demonstrated the relevance of statistics to their suit, they failed to show that discovery of the files was necessary. Focused discovery could have been employed. Appellants failed to show prejudice from the denial of their full discovery request.

[4] Appellants contended that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions, have a discriminatory impact on Hispanic officers laterally hired from other police departments. Appellants challenged the district court's finding that these pay and promotion claims were governed by *LULAC*. The court agreed that the district court misapplied *LULAC*. [5] The district court in this case held that *LULAC* governed all aspects of lateral transfers including credits, salary and classification. *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from these policies. Moreover, the bilingual lateral transfer program began in 1974-1975 following the initiation of the *LULAC* suit. Because the district court misapplied *LULAC*, the court reversed the grant of summary judgment on this issue and remanded for consideration of appellants' claim.

[6] The district court denied class certification primarily upon a finding that the three no-longer-employed appellants failed to meet the commonality and typicality requirements, and the court found this ruling to be correct.

[7] Caro claimed that the district court erred in granting summary judgment to appellees on his pre-termination claims based on a finding that the claims were barred by res judicata. [8] In California, to whose law the court looked for the applicable res judicata and collateral estoppel principles, res judicata precludes a plaintiff from litigating a claim if the claim relates to the same primary right as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action. Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action.

[9] Appellants alleged the existence of a racially discriminatory atmosphere at the SAPD, contending that enough evi-

dence was presented that a reasonable jury could have found the existence of a hostile work environment. The court agreed that reasonable jurors could conclude that a discriminatory atmosphere was countenanced by the chief of police and allowed to exist at SAPD. The court remanded this claim for submission to a jury, but limited the remand to Sanchez's and Torres' claims against the City.

[10] Sanchez and Torres alleged that they were unlawfully retaliated against for exercising their first amendment rights. Because the court's review of the record indicated that reasonable jurors could find retaliation on one or more of these claims, the court remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, Lieutenant Williams and Sergeant Dittus to Sanchez, and the potential liability of Lieutenants Lewellen, Sterzer, and Pitzer and Sergeant Bruns to Torres. The court affirmed the directed verdicts in favor of the City and the remaining defendants, holding that the specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers.

[11] The individual appellants contended that they are immune from liability, but the court held that the district court erred in ruling that the appellants were entitled to immunity because the law in this area was insufficiently clear. [12] The causes of action upon which the court reversed the directed verdict involved particular rights that were clearly established at the time of the alleged incidents. For at least fifteen years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression. Governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination.

COUNSEL

Meir J. Westreich, Glendale, California, for the plaintiffs-appellants.

Charles Matheis, Jr., Santa Ana, California; Larry J. Roberts, Orange, California; Daniel F. Fears, Paul, Hastings, Janofsky & Walker, Costa Mesa, California, for the defendants-appellees.

OPINION

GOODWIN, Chief Judge:

Jesse J. Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department (SAPD), appeal district court judgments in their action against the City of Santa Ana, and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a). The City of Santa Ana also appeals. That appeal is addressed in *Sanchez v. City of Santa Ana*, Nos. 86-6386, 88-5827, 88-5855, slip op. — (9th Cir. 1990).

Between 1975 and 1978, the number of Hispanic police officers at the SAPD greatly increased as a result of a Bilingual Lateral Transfer Program designed to encourage Spanish-speaking officers from other California police departments to transfer to the SAPD. See generally *League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976) (finding SAPD hiring practices unconstitutional and instituting a hiring order to remedy past practices of discriminatory hiring).

In November 1977, 100 of 225 SAPD officers took a written examination to become Sergeant. Following the examination, the City Personnel Department proposed that the passing score be adjusted to enable more Hispanic officers to pass the written examination and become eligible to compete in the oral examination for the position of Sergeant. The chief of police did not support the proposal. It was not implemented.

In December 1978, Sanchez, who was hired pursuant to the Bilingual Lateral Transfer Program, observed on the roll call board a cartoon he considered to be racially offensive. Sanchez took a copy of the cartoon to the City Personnel Department. The police chief punished those involved in disseminating the cartoon. Sanchez also received an official reprimand for violating the chain of command by bringing the cartoon to the attention of the City Personnel Department, rather than the proper SAPD officials.

On January 9, 1978, Sanchez, Caro and Torres, together with other members of the SAPD, chartered an Orange County chapter of the Latino Peace Officers Association (LPOA), with Caro as president and Torres as vice-president. At a January 13, 1978 meeting between Chief Davis and minority officers, Caro, on behalf of the LPOA, presented Chief Davis with a packet of materials detailing racial problems within the SAPD (the "LPOA Packet"). Pursuant to Chief of Police Davis's instructions, Lieutenant Salazar and Lieutenant Lewellen were assigned to investigate the allegations as well as the cartoon incident. The lieutenants prepared a report for Chief Davis. The report found no racial problems, noted some isolated incidents of offensive language, and characterized some minority officers as "super-sensitive."

According to the plaintiffs, LPOA members during the next few months, became targets of selective enforcement of SAPD rules and of peer ostracism. They also claim that vari-

ous defendants made racially offensive slurs. The complaints alleged that LPOA members resigned from the organization because of their fears of ostracism and discrimination by defendants. Plaintiffs also alleged that unsafe vehicles were assigned to LPOA members and that they did not receiving adequate police back-ups during certain operations. Sanchez and Torres claim that secret and illegal personnel files were kept on them by various defendant-supervisors.

On January 13, 1978, Caro complained to Lieutenant Williams, his supervisor, that Bannon, an Anglo officer, used unnecessary force during an arrest. The allegations prompted an investigation by Bannon's supervisor, Lieutenant Dixon, but no charges resulted. Caro complained to Lieutenants Williams and Jordan, Sergeants Dittus, and Garza (the Affirmative Action Officer), that Dixon was biased.

Following the investigation, Chief Davis terminated Caro's employment on the ground that his allegation against Bannon was unfounded and made with evil intent. The termination statement also said that Caro was untruthful during the subsequent investigation. Despite Caro's contention that the investigation was biased and hostile to him, due to his involvement with the LPOA, the termination was upheld by the Santa Ana Personnel Board, the California Superior Court, and the California Court of Appeals.

Following Caro's discharge, Torres made a public statement regarding continued discrimination at the SAPD. Although he was not formally reprimanded, Torres was reminded of his duty to present discrimination claims within the SAPD before airing his grievances to the public.

In January of 1978, Torres applied for the position of Assistant Team Leader (ATL) for the patrol division, and, based on his 1977 test scores, he was next in line for the position. The list expired, however, and in March of 1978, Torres submitted his application to an ATL oral board (Lieutenants

Lewellen and Sterzer and Sergeant Bruns). Torres testified that he was questioned about and orally reprimanded for his involvement with the LPOA and the LPOA Packet. Torres never became an ATL.

In September of 1978, Torres requested a leave of absence to attend to his ill parents. His request was denied. Torres then appealed and was granted a one-week leave. At the end of the week he voluntarily resigned from the SAPD. In an April, 1979 letter to Personnel Director Botts, Torres stated that he resigned to assist his parents. Torres now claims, however, that he was constructively discharged as a result of racial discrimination.

In March of 1979, Sanchez also resigned from the SAPD. He claims that he was constructively discharged following the removal of his merit pay. *See Sanchez*, slip op. at —.

On May 18, 1979, Sanchez, Torres and Caro filed a complaint seeking damages and injunctive relief for violations of their civil rights.¹ Plaintiffs moved for full discovery of SAPD personnel files and the defendants sought a protective order to limit plaintiffs' discovery. The court granted the protective order in part, limiting plaintiffs' discovery to (1) statistical data, compiled by the SAPD, regarding the number of full-time, permanent members of the SAPD who were discharged or who resigned while under investigation, between February 1973 and July 1979 and (2) comparative data regarding the compensation of members of the SAPD between May 1975 and July 1979, with no identification of individual members beyond ethnic and sex classifications. The court's grant of the

¹On June 13, 1978, Sanchez filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC). On May 17, 1978, Torres filed a similar charge with the EEOC. On March 7, 1978, Caro also filed a charge with the EEOC. Plaintiffs received a right-to-sue letter from the U.S. Department of Justice on April 11, 1979 and timely instituted this civil action in federal district court on May 18, 1979. *See* 42 U.S.C. § 2000e.

protective order was without prejudice to the plaintiffs' moving for production of the protected material if the action were certified as a class action. The plaintiffs thereafter moved for class certification on behalf of all Hispanic officers, pursuant to Fed. R. Civ. P. 23(b)(1), (b)(2), which the district court denied on February 26, 1980.

Defendants moved to dismiss or in the alternative for summary judgment or partial summary judgment. Partial summary judgment was granted to defendants as to (1) all issues concerning defendants' hiring practices; (2) Sanchez's complaints based on his failure to get Crime Scene Investigator pay; (3) Torres's claim of discrimination for failure to promote him to Sergeant; and (4) all generalized claims of a disparate impact from disciplinary proceedings being more frequent towards Hispanics than others. Defendants were also granted partial summary judgment as to all of Caro's pre-termination claims. Caro's pre-termination claims were precluded by his state proceedings, but Caro's post-termination claims were preserved.

Sanchez was granted summary judgment against the City of Santa Ana on his claim of denial of due process in removal of his merit pay, but was denied summary judgment on his first amendment discriminatory retaliation claim. Following thirty-nine days of trial, a verdict was directed in favor of the defendants on all remaining claims. The court, as noted in the companion appeal, referred Sanchez's claims for damages to the jury.

The City moved for judgment notwithstanding the verdict or for a new trial and both motions were denied. The defendants' motions for attorney's fees were granted and defendants were awarded \$471,558.71. Sanchez's motion for determination of prevailing party status was granted on his due process claim but denied on his other claims; he was denied attorney's fees and costs.

JURISDICTION

All but five of the defendants² contend that this court lacks jurisdiction over this appeal because the district court improperly vacated Fed. R. Civ. P. 54(b) certification of the final directed verdict judgments, and the plaintiffs did not timely appeal from the certified judgment. We reject this contention.³

In directing a verdict on most of the plaintiffs' claims, the district court ordered the defendants to prepare a judgment in conformance with the directed verdict. There is no indication in this order that the court directed the judgment to be certified under Fed. R. Civ. P. 54(b).⁴

On December 4, 1985, the defendants filed a proposed judgment reciting that there was no just reason for delay, and directing that judgment be entered forthwith pursuant to Rule 54(b). The district court entered the judgment and served it on all the parties. It is undisputed that the plaintiffs failed to file a notice of appeal within thirty days of this judgment, as required by Fed. R. App. P. 4.

At a hearing on February 24, 1986, the plaintiffs argued that the December 5, 1985 judgment was not appealable

²Defendants Collins, Dittus, Faust, Lanner and McDaniel.

³A motions panel of this court has previously ruled that this court has jurisdiction over the plaintiffs' appeal. While this court gives deference to motions panel decisions made in the course of the same appeal, we have an independent duty to decide whether we have jurisdiction. *See Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988).

⁴Rule 54(b) provides in part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

because the district court had not intended to certify the judgment under Rule 54(b). The plaintiffs reminded the court that on December 9, 1985, four days after entry of judgment, the court had indicated that it intended there be only a single, final judgment from the case. At a March 10, 1986 hearing on the plaintiffs' motion to correct the judgment, the court stated that it never intended to certify the judgment under Rule 54(b) and vacated the 54(b) certification.

Fed. R. Civ. P. 60(a) provides that clerical mistakes in judgments arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. "The error can be corrected whether it is made by a clerk or by the judge." *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987).

In deciding whether the district court may alter a judgment pursuant to Rule 60(a), our focus is on what the court originally intended to do. *Id.* Rule 60(a) is limited, however, to correcting errors "arising from omission" and may not be used to correct more substantial errors, such as errors of law. *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (per curiam).

The situation here falls under Rule 60(a). The district judge stated on the record that he never intended to grant 54(b) certification. We find no reason to doubt the district judge's statements, particularly in light of his failure to direct the defendants to include 54(b) certification in the final judgment he asked them to prepare. *See Blanton*, 813 F.2d at 1577. Accordingly, the error arose from oversight or omission and was within the district court's power to correct under 60(a). *See Waggoner*, 743 F.2d at 644.⁵

⁵The defendants contend that the district court did not have the authority to correct the judgment under Rule 60(a) because the rule may not be used to correct substantial errors. By "substantial" errors, the court means

PROTECTIVE ORDER

[1] Plaintiffs claim that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. Defendants correctly argue that the protective order was proper because of the confidential nature of the requested files.

[2] Federal Rule of Civil Procedure 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. *Kerr v. United States Dist. Ct. for N.D. Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). Government personnel files are considered official information. *See, e.g., Zaustinsky v. University of Cal.*, 96 F.R.D. 622, 625 (N.D. Cal. 1983), *aff'd*, 782 F.2d 1055 (9th Cir. 1985). To determine whether the information sought is privileged, courts must weigh the potential benefits of disclosure against the potential disadvantages. If the latter is greater, the privilege bars discovery. *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980); *Zaustinsky*, 96 F.R.D. at 625.

The relevance of plaintiffs' discovery request for employment data is undisputed. Most of the relevant information, however, could have been developed by interrogatories. It is well-settled that an employee may prove his or her claim of unlawful discrimination by evidence that other employees of different races or national origin were treated differently in similar circumstances. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973); *Diaz v. American Telephone &*

non-clerical errors; it is not referring to the magnitude of the error. *Waggoner*, 743 F.2d at 644-45. Because the district court's error was clerical, it was within the district court's power to correct the judgment under 60(a).

Telegraph, 752 F.2d 1356, 1362-63 (9th Cir. 1985). Statistical evidence alone may make out a prima facie case of unlawful discrimination. *Wards Cove Packing Co., Inc. v. Antonio*, — U.S. —, 109 S. Ct. 2115, 2121 (1989).

Plaintiffs seek more than statistical data of officer employment termination, discipline and compensation. They demanded access to the SAPD's personnel files to compile their own statistics. While these files are not absolutely privileged, the confidential nature of the employee personnel files suggests that opening the files to the plaintiffs for a general search could reach well beyond the legitimate inquiries necessary to this litigation and would impact disciplinary procedures within the SAPD. The SAPD claims that the files contain additional confidential information that is irrelevant to plaintiffs' suit.

[3] The district court did not abuse its discretion in denying access to these files. See *Ah Moo v. A.G. Becker Paribas, Inc.*, 857 F.2d 615, 619 (9th Cir. 1988). While plaintiffs demonstrate the relevance of statistics to their suit, they fail to show that discovery of the actual files was necessary. Focused discovery could have been employed. Plaintiffs accuse the defendants of inaccurate statistical conclusions, but they were free to utilize the statistics to draw their own conclusions. In addition, the plaintiffs had access to the same EEOC data from which the SAPD's expert compiled the statistics in question, and, when investigating a charge, the EEOC has "a broad right of access to relevant evidence." *University of Pa., Petitioner v. Equal Employment Opportunity Commission*, — U.S. —, 110 S. Ct. 577, 583 (1990) (citing 42 U.S.C. § 2000e-8(a)). The SAPD's expert did not draw conclusions from the files themselves but from the EEOC data. Plaintiffs have not alleged that the EEOC data is biased or that they were denied access to this data. They fail to show prejudice from the denial of their full discovery request.

SUMMARY JUDGMENT ON PAY AND PROMOTION CLAIMS

[4] Plaintiffs claim that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions, have a discriminatory impact on Hispanic officers hired laterally from other police departments.⁶ Plaintiffs challenge the district court's finding that these pay and promotion claims were governed by *LULAC*, 410 F. Supp. 873 (C.D. Cal. 1976). We agree that the district court misapplied *LULAC*.

[5] In *LULAC* the district court held that the City of Santa Ana engaged in discriminatory hiring practices that resulted in disproportionately few Mexican-American police or firemen. 410 F. Supp. at 911-12. The suit was brought in 1974 by a rejected Hispanic police applicant and by the League of United Latin American Citizens on behalf of its members. Finding unlawful discrimination, the district court also mandated that a preferential hiring order be instituted in future proceedings. *Id.* at 911. The district court in the instant case held that *LULAC* governed "all aspects of *lateral* transfers including credits, salary and classification." (emphasis added). *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from those policies. *LULAC* only addresses hiring policies for new applicants to the police force. Moreover, the bilingual lateral transfer program began in 1974-75 following the initiation of the *LULAC* suit. Because the district court erroneously applied *LULAC* we reverse the district court's grant of summary judgment on this issue and remand for consideration of the plaintiffs' claim.

⁶Officers hired laterally from other police departments enter as "step C" employees as compared to rookie police officers who enter at "step A." Advancement to steps D and E is based on merit.

SUMMARY JUDGMENT ON OTHER DISPARATE IMPACT CLAIMS

Plaintiffs alleged that the defendants enforced City and department regulations in a racially and ethnically discriminatory fashion. On the basis of the defendants' statistical data, which did not reveal any discrimination, the district court granted summary judgment to defendants on all generalized claims of disparate impact from disciplinary proceedings.

On appeal, plaintiffs challenge this summary judgment because they were denied equal access to personnel files which they claim would have allowed them to compile contradictory statistics and challenge defendants' evidence. As discussed previously, this claim has no merit.

DENIAL OF CLASS CERTIFICATION

[6] Sanchez, Torres, and Caro brought this action as individuals and as a class on behalf of all Spanish-surnamed individuals employed by the City as police officers, past, present and future, pursuant to Fed. R. Civ. P. 23(a), (b)(1), (b)(2). The district court denied class certification primarily upon a finding that the three no-longer-employed plaintiffs failed to meet the commonality and typicality requirements of Fed R. Civ. P. 23(a)(2) & (3). This ruling is correct.

On appeal plaintiffs argue that the denial of equal access to the personnel files prevented them from specifically alleging commonality or typicality. As previously noted, this claim has no merit and the district court did not abuse its discretion in refusing to certify this class. *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), cert. denied, — U.S. —, 110 S. Ct. 69 (1989); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 779 (9th Cir.), cert. denied, 476 U.S. 1170 (1986).

CARO'S PRE-TERMINATION CLAIMS

[7] Caro claims that the district court erred in granting summary judgment to defendants on his pre-termination claims based on a finding that the claims were barred by *res judicata*. We affirm the district court.

Following Caro's termination from the SAPD, he appealed the dismissal to the Personnel Board of the City of Santa Ana seeking a reversal and reinstatement. The Personnel Board denied his requests, and Caro instituted an action in the California Superior Court seeking the same relief. He lost in the Superior Court and appealed to the Court of Appeals where he also lost. The Court of Appeals specifically found that Caro was afforded a full and fair hearing at the Personnel Board and that there was no bias or prejudice, racial or otherwise, involved in, or causing his discharge. The court also held that there were no due process violations. In response to the *res judicata* defense in the district court, Caro argued that the defendants conspired to obstruct justice and deter witnesses who might have testified on his behalf in violation of 42 U.S.C. § 1985(2).

It is well-established that where a federal constitutional claim is based on the same asserted wrong as a state action and the parties are the same, *res judicata* will bar the federal constitutional claim, whether or not it was asserted specifically in state court. 28 U.S.C. § 1738 (1982); *Trujillo v. County of Santa Clara*, 775 F.2d 1359, 1363 (9th Cir. 1985); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

[8] In California, to whose law we must look for the applicable *res judicata* and collateral estoppel principles, *Punton v. City of Seattle*, 805 F.2d 1378, 1380 (9th Cir. 1988), *cert. denied*, 481 U.S. 1029 (1989), *res judicata* precludes a plaintiff from litigating a claim if the claim "relates to the same 'primary right' as a claim in a prior action, the prior judgment

was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action." *Trujillo*, 775 F.2d at 1366, (citing *Slater v. Blackwood*, 15 Cal.3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (Cal. 1975)). Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action. Moreover, he could have raised the specific allegation of conspiracy to obstruct justice in his state court proceedings.

Caro argues that he was not afforded a full and fair opportunity to litigate the claim in the state court and, accordingly, he should not be barred from litigating his pre-termination claims in federal court. We reject this contention.

Collateral estoppel does not apply when the party against whom it is asserted did not have a "full and fair opportunity" to present the case. *Kremer v. Chemical Constr.*, 456 U.S. 461, 480-81 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980). The Supreme Court has stated, however, that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. Caro claims that Community Service Officer Christine Schuller was intimidated by various defendants and as a result would not testify on his behalf. He failed, however, to produce proof of that assertion. Moreover, Caro does not claim, and we do not find, that the California courts violated minimum standards of due process.

Caro also contends that issue and claim preclusion should not apply to claims brought under 42 U.S.C. § 1985(2). While the Supreme Court has not stated specifically that claim and issue preclusion principles apply to section 1985(2) conspiracy claims, it has held these principles applicable to Title VII and section 1983 suits. See *Migra v. Warren City School Dist. Bd of Ed.*, 465 U.S. 75 (1984) (state preclusion law applies to section 1983 claims); *Kremer*, 456 U.S. at 461 (claim and

issue preclusion apply to Title VII actions). Moreover, in *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd*, *Kush v. Rutledge*, 460 U.S. 719 (1983) we afforded full faith and credit to state judicial proceedings involving an athlete's claim that he was assaulted by his coach and that the team engaged in a cover-up of the incident in violation of section 1985(2). Likewise, we conclude that Caro's claim that justice was obstructed during the Personnel Board and state court proceedings is barred.

DIRECTED VERDICTS

Following the completion of the plaintiffs' oral presentation of evidence, defendants were granted directed verdicts on all remaining claims. Plaintiffs appeal the verdicts on the following claims: (1) The existence of a racially discriminatory atmosphere; (2) The unlawful retaliation against the plaintiffs for engaging in protected speech; (3) The discrimination and retaliation based on race and national origin; and (4) The conspiracies against plaintiffs due to their exercise of first amendment rights, their race and national origin, and defendants' obstruction of justice.

A. Discriminatory Environment

[9] Plaintiffs allege the existence of a racially discriminatory atmosphere at the SAPD in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e. They claim that enough evidence was presented that a reasonable jury could have found the existence of a hostile work environment.⁷ We agree that

⁷Plaintiffs do not distinguish between their causes of action under section 1981 and Title VII. They contend that parallel claims under section 1981 and Title VII should be assessed by like standards. The Supreme Court has stated, however, that while there is a "necessary overlap" between these two statutes, section 1981 does not apply to post-contract formation conduct unrelated to an employee's right to enforce his or her contract. *Patterson v. McClean Credit Union*, — U.S. —, 109 S. Ct. 2363, 2374-75 (1989). Title

reasonable jurors could conclude that a discriminatory atmosphere was countenanced by the chief of police and allowed to exist at the SAPD. Accordingly, this claim is remanded to the district court for submission to a jury. We limit this remand, however to Sanchez's and Torres's claims against the City,⁸ Chief Davis, Captains Hansen and Stebbens, Lieutenant Williams and Sergeants Dixon and Faust. The jury would be entitled to know about Sanchez's award on his due process claim, however, to avoid double recovery. The record contains no evidence to support a claim against the remaining defendants. Caro's claims are barred.

It is well-settled that "the language of Title VII is not limited to 'economic' or 'tangible' discrimination."⁹ *Meritor Sav-*

VII, on the other hand, applies to racial harassment in the course of employment. See *id.* at 2374; *Meritor Savings Bank, FSB v. Vinson, et al.*, 477 U.S. 57, 65-66 (1986) (Court discusses Title VII's application to sexual harassment). Because plaintiffs' hostile atmosphere claim does not involve specific allegations of a refusal to make a contract or the impairment of their ability to enforce contract rights, it should be analyzed under Title VII. *Patterson*, 109 S. Ct. at 2374.

⁸While the Supreme Court has restricted the application of sections 1981 and 1983 to public employers, see *Jett v. Dallas Independent School Dist.*, — U.S. —, 109 S. Ct. 2702 (1989) (rejecting *respondeat superior* as a basis for holding a state actor liable under section 1983 for violation of rights under section 1981); *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 690 (1978) (municipality may only be liable for violations of section 1983 where the violation was caused by "a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body's officers."); see also *City of St. Louis v. Praprotnik*, 485 U.S. 112 (clarifying the requirements established in *Monell*), the Supreme Court has not indicated that a public employer cannot be held liable for violations of Title VII under the theory of *respondeat superior*. See *Collins v. City of San Diego*, 841 F.2d 337 (9th Cir. 1988) (discussing *respondeat superior* liability).

⁹Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privilege of employment, because of such individual's race, color, religion, sex or national origin" 42 U.S.C. § 2000e - 2(a)(1).

ings Bank, 477 U.S. at 64 (1984); *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972). The creation of a racially discriminatory or hostile work environment is actionable under Title VII. See *Katz v. Dole*, 709 F.2d 251, 254-55 (4th Cir. 1983); *Henson v. City of Dundee*, 682 F.2d 897, 902 (11th Cir. 1982); *Rogers*, 454 F.2d at 238; *Smithberg v. Merico Inc.*, 575 F. Supp. 80 (C.D. Cal. 1983).

The seminal case on hostile work environment comes from the Fifth Circuit. In *Rogers*, the court announced the principle that an employee's psychological well-being is statutorily protected from a discriminatory work environment. 454 F.2d 234. The Supreme Court affirmed this principle and applied it to sexual harassment cases in *Meritor Savings Bank*, 477 U.S. at 56-66. Both courts stated, however, that "an employer's mere utterance of an ethnic or racial epithet which engenders offensive feelings in an employee [does not fall] within the proscription of Section 703 [of Title VII]" *Meritor Savings Bank*, 477 U.S. at 67; *Rogers*, 454 F.2d at 238.

Plaintiffs allege more than a "mere utterance of an ethnic or racial epithet." They presented testimony that Lieutenant Williams, Sergeants Dixon and Faust made racial slurs and objected to Spanish being spoken during informal conversations. Chief Davis and Captains Hansen and Stebbens allegedly permitted racial slurs and contributed to the hostile environment by their reactions to the LPOA and treatment of its members. Evidence that members of the SAPD posted offensive cartoons in the SAPD work space was also presented. Based on this evidence in combination with plaintiffs' other evidence of racial tensions surrounding the sergeant's examination and the LPOA, reasonable persons could conclude that a hostile atmosphere existed at the SAPD. Reasonable jurors could also find that one or more of the above-named defendants could have contributed to this atmosphere, and that Sanchez and Torres were victims of this hostility. The district court therefore erred in directing a verdict in favor of these defendants; Sanchez and Torres are entitled

to a jury determination of whether a violation of Title VII was committed, and by whom, and what damages, if any, flowed therefrom. The district court must also determine whether the City can be liable under common law principles of *respondeat superior* for any violations which the court may find the officers liable. See *Meritor Savings Bank*, 477 U.S. at 72 (issue of employer liability cannot be decided until record below is developed as to individual liability).

B. First Amendment Claims

[10] Sanchez and Torres allege that they were unlawfully retaliated against for exercising their first amendment rights in violation of 42 U.S.C. § 1983. Our review of the record indicates that reasonable jurors could find retaliation on one or more of these claims. These claim are remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, Lieutenant Williams and Sergeant Dittus to Sanchez,¹⁰ and the potential liability of Lieutenants Lewellen, Sterzer and Pitzer and Sergeant Bruns to Torres. The directed verdicts in favor of the City and the remaining defendants are affirmed. The specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers. Public entities are liable under section 1983 only when the constitutional violation occurs as a result of a policy or custom. *Monell*, 436 U.S. at 690-91; *Praprotnik*, 485 U.S. at 122-23. Plaintiffs failed to prove the existence of such a policy or custom.

"To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Soranno's Gasco, Inc. v. Mor-*

¹⁰In this appeal, we do not consider Sanchez's claims of retaliation for first amendment protected activity where the alleged retaliation is poor reviews and the removal of his merit pay. These claims are the same as those for which he received a jury verdict. See *Sanchez*, at slip op. —

gan, 874 F.2d 1310, 1313-14 (9th Cir. 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). A violation of section 1983 occurs where an employee is wrongfully retaliated against for speech protected by the first amendment. See *Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ. of Township High School Dist. 205, Will County Ill.*, 391 U.S. 563 (1968); *Allen v. Scriber*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (1987).

To make a successful claim for wrongful retaliation under the first amendment and section 1983, the plaintiff must prove that: (1) the statement that brought on the retaliation is one of "public concern;" (2) the constitutionally protected expression is a "substantial" or "motivational" factor in the employer's adverse decision or conduct; and (3) the interests of the plaintiff/employee in commenting on the matter of public concern outweigh the state's interest in maintaining efficient public services. See *Allen*, 812 F.2d at 430-32. The defendants concede or do not contest that the incidents alleged by Sanchez and Torres are protected under the first amendment.

Sanchez and Torres testified to numerous instances that a reasonable jury could have found to be unconstitutional retaliation. Plaintiffs testified that the above identified defendants reacted adversely to the formation of the LPOA, the LPOA meeting with city personnel, the submission of the LPOA packet, the filing of EEOC complaints, the instigation of legal activity, Torres's press conference, and Sanchez's and Torres's public support of Caro following his discharge. Moreover, Sanchez was formally reprimanded for his reporting of the cartoon, both Sanchez and Torres testified to being ostracized and victims of a "silent treatment" and of selective enforcement of the rules, and Torres claimed that he was penalized in his interview for the ATL position and received poor reviews. These claims of first amendment retaliation are

therefore remanded for submission to the jury. Sanchez and Torres are entitled to a jury determination of whether the first amendment has been violated, and by whom, and what damages, if any, would be required to repair any injuries caused by the alleged retaliation.

The evidence, however, does not support a claim that the SAPD's policy of bringing grievances to authorities in the SAPD before bringing them to the City or the public, was unreasonable as to Sanchez. The Supreme Court has held that a public employer can impose reasonable limitations on the manner that employer grievances are handled. *Connick*, 461 U.S. 138. "The problem . . . is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public service it performs through its employees." *Pickering*, 391 U.S. at 568.

In applying this test, we have held that a police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees. *Allen*, 812 F.2d at 432; *Boyd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977) (court refuses to expunge reprimands from personnel files of officers who issued public statements about the police department's stop and frisk tactics), *cert. denied*, 434 U.S. 1087 (1978). The SAPD's policy of bringing grievances first through appropriate channels to authorities in the department before bringing them to the City or the public is reasonable and not arbitrary. There was no constitutional violation in requiring officers to communicate "through channels" before enlisting public opinion to their cause.

C. Discrimination/Retaliation

All three plaintiffs claim that substantial evidence was presented to sustain their allegations that the defendants violated sections 1981, 1983, and Title VII by retaliating against them

because of their race. Their claims are founded on the fourteenth amendment's equal protection and due process clauses. This directed verdict is affirmed. Caro's claims are barred. Sanchez received favorable verdicts from the jury on his separate fourteenth amendment due process claim.¹¹ There is no evidence to support Torres's claims; his grievances are best addressed under the first amendment analysis discussed previously.

D. Conspiracies

Plaintiffs claim that substantial evidence supports the inference of a single conspiracy managed and implemented by Chief Davis and Captain Hansen and involving all other defendants. They allege the same incidents of first amendment protected activities to support their conspiracy claim under section 1983. While we agree that enough evidence exists to reverse many of the directed verdicts, we do not find evidence to support a conspiracy claim under 42 U.S.C. § 1983.

Plaintiffs also claim that the defendants conspired to obstructed justice by deterring witnesses from testifying on behalf of Caro and by presenting false evidence at Caro's termination hearing depriving them of equal protection under the law in violation of 42 U.S.C. §§ 1985(2), 1986. This claim is meritless.

Section 1985 proscribes conspiracies to interfere with civil rights. A claim brought under the first and second clauses of section 1985(2) requires a direct or indirect purpose to deprive any persons of the equal protection of the laws, or the equal privileges or immunities under the laws and a class race-based animus. See *Kush*, 460 U.S. 719; *Griffin v. Breck-*

¹¹Our decision to vacate the award of \$500,000 for emotional distress injury because it is barred by principles of res judicata, see *Sanchez*, slip op. at —, does not affect our decision here.

enridge, 403 U.S. 88 (1971); *Bretz v. Kelman*, 773 F.2d 1026, 1028 (9th Cir. 1985) (en banc). To be actionable, the conspiracy must result in overt acts, done in furtherance of the conspiracy, that are both the cause in fact and proximate cause of plaintiffs' injuries. See *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A mere allegation of conspiracy without factual specificity is insufficient to support a claim. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988).

Plaintiffs allege the required class — Hispanic police officers — but their evidence of a conspiracy to obstruct justice aimed at the class is lacking. The basis of their claim is that state court proceedings were obstructed when defendants allegedly intimidated Officer Schuller from testifying on Caro's behalf. As noted above, this claim is barred by *res judicata*. Moreover, defendants have presented uncontroverted evidence that Schuller refused to testify of her own free will.

Plaintiffs also claim that Officer Fernandez was influenced to suppress evidence that Sergeant Dixon, who originally investigated Caro's complaint against Officer Bannon, was hostile to Caro. Plaintiffs presented evidence that Fernandez lied to the Personnel Board about his knowledge of Sergeants Dixon's potential bias. Even viewing this evidence in Caro's favor, however, one incident does not amount to substantial evidence of a conspiracy to obstruct justice directed at the class of Hispanic police officers.¹²

Likewise, plaintiffs' claim against the individual defendants under section 1986 is meritless. "Section 1986 imposes liability on every person who knows of an impending viola-

¹²Plaintiffs also allege that Chief Davis lied about the handling of the Caro matter when he testified in the state proceedings and that Lieutenant Williams inflated his state court testimony of Caro's excessive force charge. Neither of these incidents, however, evidence a conspiracy between two or more SAPD members.

tion of section 1985 but neglects or refuses to prevent the violation." *Karim-Panahi*, 839 F.2d at 626. A violation of section 1986 thus depends on the existence of a valid claim under 1985. *Id.*; *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985); *Mollnow v. Carlton*, 716 F.2d 627, 632 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

INDIVIDUAL LIABILITY ON REMAND

[11] The individual defendants contend that they are immune from liability. We address their claim to guide the district court upon remand, and hold that the district court erred in ruling that the defendants were entitled to immunity because the law in this area was insufficiently clear. On remand, however, the court should also consider whether any of the defendants were performing non-discretionary functions and enjoyed qualified immunity for their actions on that basis.

Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Good faith qualified immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." *Id.* See also *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (the contours of the right must be sufficiently clear to a reasonable official so that the actor would have understood that what he was doing violated that right).

[12] The causes of action upon which we reverse the directed verdict involve particular rights that were clearly established at the time of the alleged incidents. See *Connick v. Myers*, 461 U.S. 138 (1983) ("for at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally pro-

ected interests in freedom of expression."); *Gutierrez v. Municipal Ct. of Southeast Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1050-51 (9th Cir. 1988) (governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination), *vacated on mootness grounds*, — U.S. —, 109 S. Ct. 1736 (1989); *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir.) ("[n]o official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it."), *cert. denied*, 449 U.S. 875 (1980); *Rogers*, 454 F.2d at 238 (racially discriminatory atmosphere claim is actionable under Title VII).

ATTORNEY'S FEES

Upon post-trial motion, the Sergeant-defendants and the other nine individual defendants were awarded attorney's fees under 42 U.S.C. § 1988. Plaintiffs challenge these awards.

The district court found that the plaintiffs abused the legal process and dragged innocent individuals through the court system. Plaintiffs contend that, because many of the defendants' motions for summary judgment were denied, their claims have merit and attorney's fees were improperly awarded against them. Both sides claim too much from the record. Court time was wasted by both sides, some of it on groundless claims by plaintiffs, some of it by litigation-happy defense tactics. The meters in the law offices were running, but fee shifting was not warranted in this case.

Under section 1988 a court may award attorney's fees to a prevailing defendant if the court finds that the plaintiff's action is "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. Equal Employment Opportu-*

nity Commission, 434 U.S. 412 (1978). See also *Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980) (applying *Christiansburg* to 42 U.S.C. § 1983 case). In *Jensen v. Stangel* we held that denials of motions to dismiss and summary judgment may suggest that a plaintiff's claims are not without merit. 762 F.2d 815, 818 (9th Cir. 1985). While defendants are correct in noting that in *Jensen* we reversed the attorney's fees award primarily upon other grounds, *Jensen* nevertheless, provides guidance.

As in *Jensen*, two trial judges presided over different parts of these proceedings. By denying many of defendants' motions for summary judgment, Judge Hill apparently believed that parts of the plaintiffs' case had enough merit to proceed to the next stage of litigation. Judge Kenyon, after hearing 39 days of trial, found that most of the claims were not proven or were otherwise barred. Logic and fairness dictate that where two judges disagree, attorney's fees should not be awarded en gross for bringing a frivolous case.

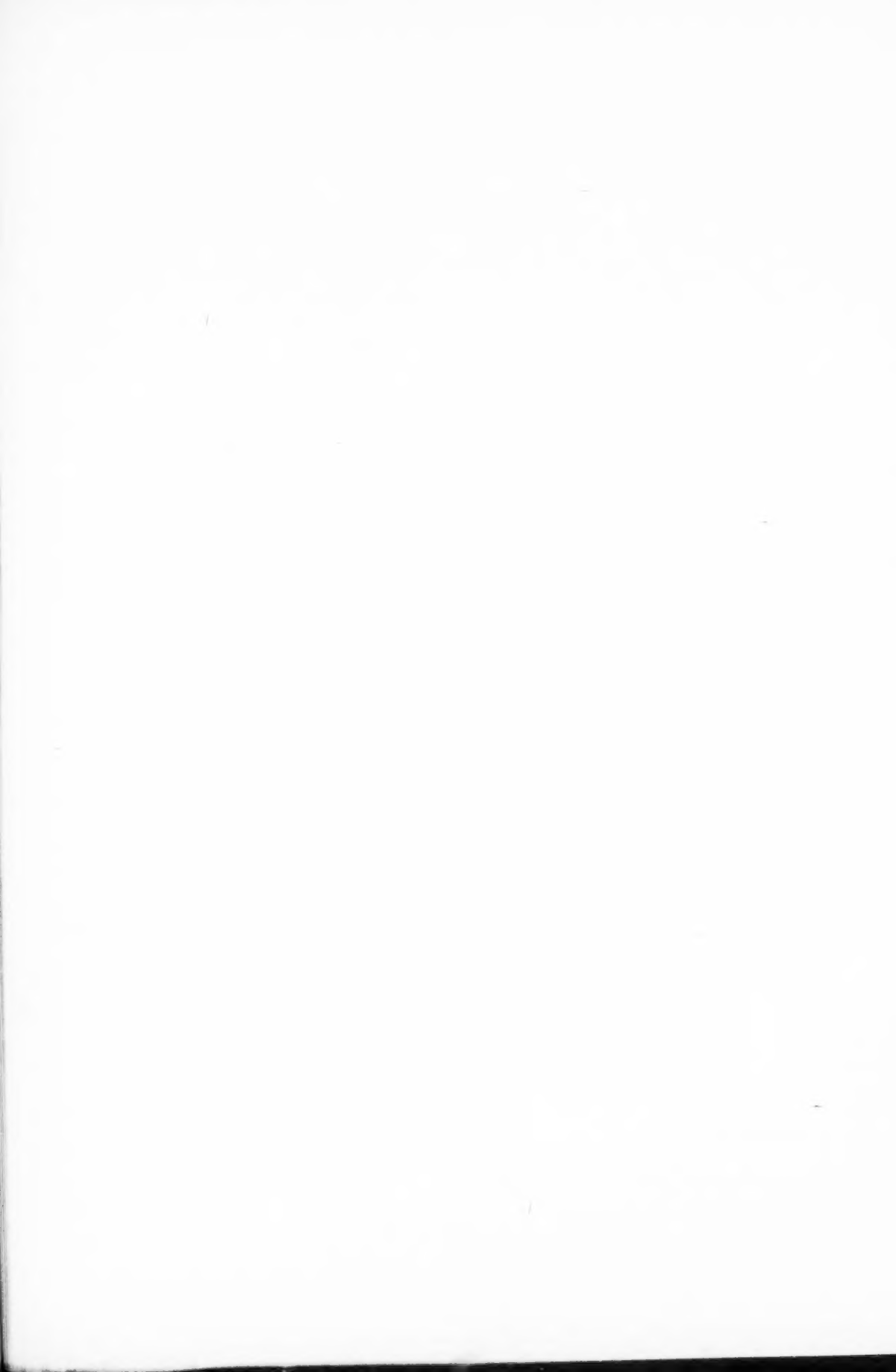
Massive fee awards against plaintiffs who continue to trial are contrary to Congress' goal of "promoting vigorous prosecution of civil rights violations under Title VII and § 1983." *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 619 (9th Cir. 1987). We therefore reverse the district court's award of attorney's fees. To the extent that the City had to finance heavy defense costs, there is abundant evidence in this record that the City could have avoided much of the problem by employing a less confrontational approach to departmental grievances after having recently been through, and losing, the *LULAC* litigation.

We need not address whether the allocation of the burden of the fee award was an abuse of discretion because we hold that no award was warranted.

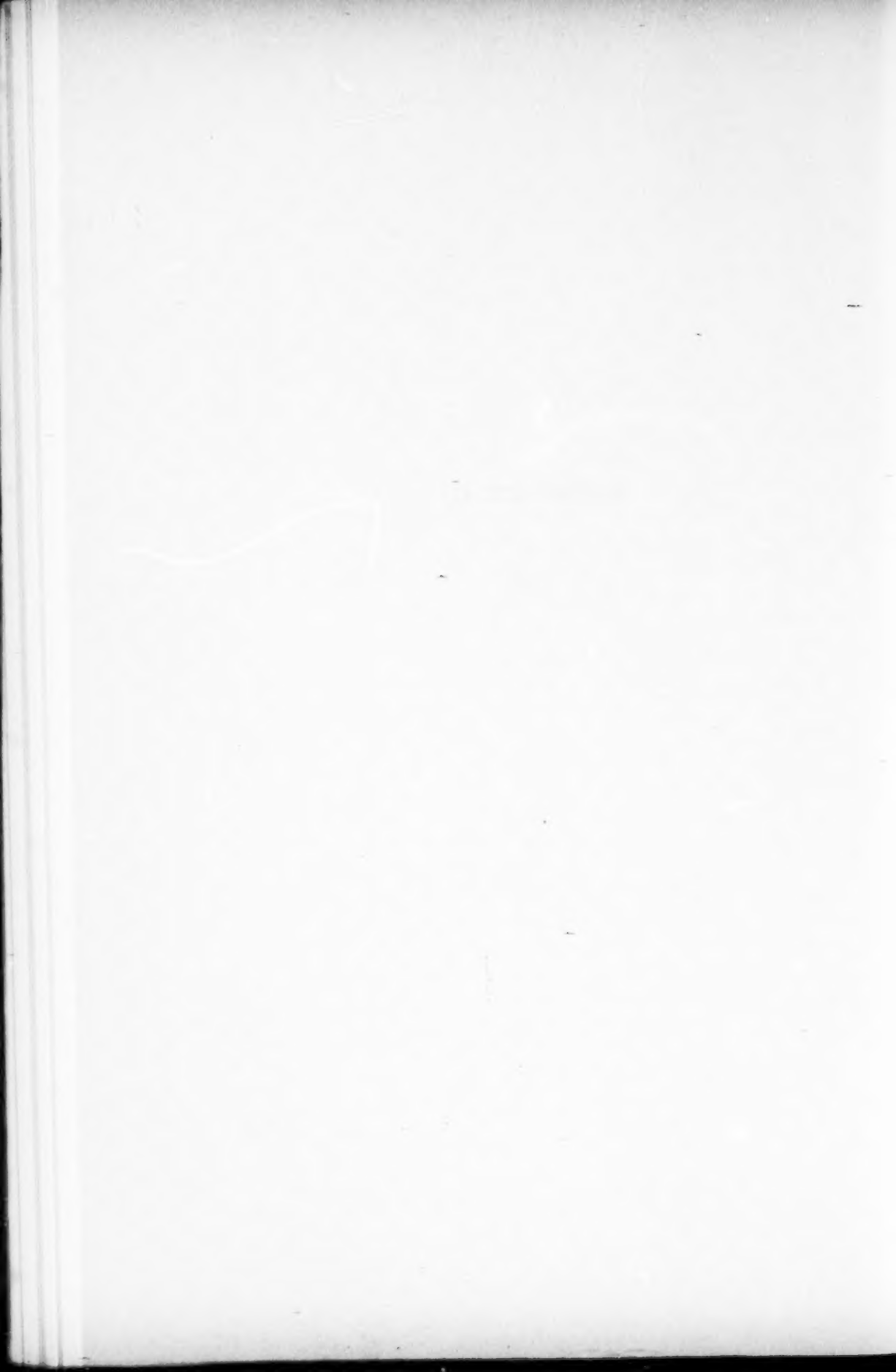
There was no abuse of discretion in the district court's decision to deny attorney's fees to Sanchez. Sanchez came out of the case with adequate funds to pay his fees and costs.

The parties will bear their own costs of appeal.

AFFIRMED IN PART, REVERSED IN PART AND
REMANDED.



APPENDIX G



FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellants,

v.

CITY OF SANTA ANA; CITY OF SANTA
ANA POLICE DEPARTMENT; DON
BOTTS; RAYMOND C. DAVIS; E. B.
HANSEN; ROBERT STEBBENS;
NORWOOD WILLIAMS; LEE
DRUMMOND; LAWRENCE PITZER;
MICHAEL LEWELLEN; DALE STERZER;
GARY DIXON; JOHN COLLINS; JOHN
MCDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN MCCLAIN,
Defendaants-Appellees.

Nos. 85-6504;
86-6226, 87-5614,
88-5853

D.C. No.
CV-79-1818-KN

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Filed July 11, 1990
Amended February 27, 1991

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

*Judge Irving Hill, District Judge for the Central District of California,
presided over many of the pretrial orders.

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law

Affirming in part, reversing in part, and remanding judgments of the district court, the court of appeals held that summary judgment in favor of the City of Santa Ana was improper because the district court misapplied *League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976), to former police officers' claims of discriminatory lateral promotion policies.

Appellants Jesse Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department, appealed district court judgments in their action against the City of Santa Ana and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a).

[1] Appellants claimed that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. [2] F.R. Civ. P. 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. [3] The district court did not abuse its discretion in denying access to these files. While appellants demonstrated the relevance of statistics to their suit, they failed to show that discovery of the files was necessary. Focused discovery could have been employed. Appellants failed to show prejudice from the denial of their full discovery request.

[4] Appellants contended that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions, have a discriminatory impact on Hispanic officers laterally hired from other police departments. Appellants challenged the district court's finding that these pay and promotion claims were governed by *LULAC*. The court agreed that the district court misapplied *LULAC*. [5] The district court in this case held that *LULAC* governed all aspects of lateral transfers including credits, salary and classification. *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from these policies. Moreover, the bilingual lateral transfer program began in 1974-1975 following the initiation of the *LULAC* suit. Because the district court misapplied *LULAC*, the court reversed the grant of summary judgment on this issue and remanded for consideration of appellants' claim.

[6] The district court denied class certification primarily upon a finding that the three no-longer-employed appellants failed to meet the commonality and typicality requirements, and the court found this ruling to be correct.

[7] Caro claimed that the district court erred in granting summary judgment to appellees on his pre-termination claims based on a finding that the claims were barred by res judicata. [8] In California, to whose law the court looked for the applicable res judicata and collateral estoppel principles, res judicata precludes a plaintiff from litigating a claim if the claim relates to the same primary right as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action. Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action.

[9] Appellants alleged the existence of a racially discriminatory atmosphere at the SAPD, contending that enough evi-

dence was presented that a reasonable jury could have found the existence of a hostile work environment. This was a mischaracterization of the record. The court thus affirmed judgment to the defendants.

[10] Sanchez and Torres alleged that they were unlawfully retaliated against for exercising their first amendment rights. Because the court's review of the record indicated that reasonable jurors could find retaliation on one or more of these claims, the court remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, Lieutenant Williams and Sergeant Dittus to Sanchez, and the potential liability of Lieutenants Lewellen, Sterzer, and Pitzer and Sergeant Bruns to Torres. The court affirmed the directed verdicts in favor of the City and the remaining defendants, holding that the specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers.

[11] The individual appellants contended that they are immune from liability, but the court held that the district court erred in ruling that the appellants were entitled to immunity because the law in this area was insufficiently clear.

[12] The causes of action upon which the court reversed the directed verdict involved particular rights that were clearly established at the time of the alleged incidents. For at least fifteen years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression. Governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination.

COUNSEL

Meir J. Westreich, Glendale, California, for the plaintiffs-appellants.

Charles Matheis, Jr., Santa Ana, California; Larry J. Roberts, Orange, California; Daniel F. Fears, Paul, Hastings, Janofsky & Walker, Costa Mesa, California, for the defendants-appellees.

ORDER

The opinion filed July 11, 1990 is amended as follows:

Slip op. at 7007, line 5: delete "receiving" and replace it with "receive".

Slip op. at 7021, line 16: delete "and Sergeant Dittus" insert "and" prior to "Lieutenant Williams".

Slip op. at 7022, lines 31-32: delete "Sanchez was formally reprimanded for his reporting of the cartoon,".

Slip op. at 7018, last line - 7021, lines 1-8: delete footnote 7 and text beginning with "We agree that ..." and ending with "below is developed as to individual liability)." and insert the following:

... This is a mischaracterization of the record. We affirm judgment to the defendants.

Plaintiffs do not distinguish between their causes of action under section 1981 and Title VII. They contend that parallel claims under section 1981 and Title VII should be assessed by like standards. The Supreme Court has stated, however, that while there is a "necessary overlap" between these two statutes, section 1981 does not apply to post-contract formation conduct unrelated to an employee's right to enforce his or her contract. *Patterson v. McLean Credit Union*, — U.S. —, 109 S. Ct. 2363, 2374-75

(1989). Title VII, on the other hand, applies to racial harassment in the course of employment. *See id.* at 2374; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986) (Court discusses Title VII's application to sexual harassment). Because plaintiffs' hostile atmosphere claim does not involve specific allegations of a refusal to make a contract or the impairment of their ability to enforce contract rights, it should be analyzed under Title VII. *Patterson*, 109 S. Ct. at 2374.⁷

In the district court's pretrial order, it was agreed that Title VII claims would not be tried by a jury. We have held that a jury trial need not be provided in Title VII cases. *See Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *cf. Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (where plaintiff brings an equitable discrimination claim under Title VII and a legal claim under section 1981 based on the same facts, the trial judge must follow the jury's factual findings), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1524 (1990). Accordingly, even if plaintiffs' discriminatory atmosphere claim is meritorious, we may not remand it for a jury determination.

In moving for a directed verdict, the defendants did not distinguish between plaintiffs' Title VII and 1981 claims. Likewise, in directing a verdict the district court did not make this distinction. The court found simply that "no reasonable person could find for the plaintiffs." In our review, however, we must make this distinction. We are not deciding whether

⁷Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (1988).

the district court improperly took the issue away from the jury, but whether the district court erred in deciding the issue without hearing from the defense.

Federal Rule of Civil Procedure 41(b) allows the district judge presiding over a bench trial to decide the case following the close of the plaintiffs' case. In *Johnson v. United States Postal Service*, 756 F.2d 1461, 1464 (9th Cir. 1985), we held that a district court's factual findings made pursuant to Rule 41(b) should be reviewed under the clearly erroneous standard. We also held that ultimate findings under Rule 41(b) are mixed questions of law and fact and are reviewed de novo. *Id.* at 1465. While the defendants did not make a Rule 41(b) motion, their motion for a directed verdict at the close of plaintiffs' case on an issue that will ultimately be decided by the judge has the same effect. Accordingly, we adopt the same standard of review.

We cannot say that the district court's ultimate conclusion, that the plaintiffs failed to prove the existence of a discriminatory atmosphere, is incorrect as a matter of law. The "directed verdict" is affirmed.

Slip op. page 7021, lines 24-25: delete "*Monell*, 436 U.S. at 690-91; *Praprotnik*, 485 U.S. at 122-23." insert "*Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-91 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122-23 (1988)."

Slip op. page 7028, lines 32-34: delete "There was no abuse of discretion in the district court's decision to deny attorney's fees to Sanchez. Sanchez came out of the case with adequate funds to pay his fees and costs." insert

The district court abused its discretion in denying attorney's fees to Sanchez. A plaintiff in a civil rights

suit is a prevailing party and is entitled to an award of attorney's fees if he "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" *Texas State Teachers Ass'n v. Garland Independent School Dist.*, — U.S. —, 109 S. Ct. 1486, 1493 (1989). We remand to the district court to award reasonable attorney's fees in connection with that part of the verdict affirmed in the City's companion appeal, *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990).

Slip op. page 7024, line 20: delete "obstructed" and insert in its place "obstruct".

Slip op. page 7026, line 14: delete "non-discretionary" and insert in its place "discretionary".

Slip op. page 7005, 1st full paragraph of opinion text, lines 11-12: delete "Nos. 86-6386, 88-5827, 88-5855, slip op. — (9th Cir. 1990)." and insert in its place "915 F.2d 424 (9th Cir. 1990) (Nos. 86-6386, 88-5827, 88-5855)."

Slip op. page 7021, footnote 10, line 4: delete "*Sanchez*, at slip op. —" and replace it with "*Sanchez v. City of Santa Ana*, 915 F.2d 424, 426-28, 430-31 (9th Cir. 1990).

Slip op. page 7024, footnote 11, lines 2-3: delete "slip op. at —," and replace it with "915 F.2d at 431-32,"

With these amendments the parties' petitions for rehearing are denied. Judges Schroeder and O'Scannlain have voted to reject the suggestions for rehearing en banc, and Judge Goodwin so recommends.

OPINION

GOODWIN, Chief Judge:

Jesse J. Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department (SAPD), appeal district court judgments in their action against the City of Santa Ana, and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a). The City of Santa Ana also appeals. That appeal is addressed in *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990) (Nos. 86-6386, 88-5827, 88-5855).

Between 1975 and 1978, the number of Hispanic police officers at the SAPD greatly increased as a result of a Bilingual Lateral Transfer Program designed to encourage Spanish-speaking officers from other California police departments to transfer to the SAPD. See generally *League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976) (finding SAPD hiring practices unconstitutional and instituting a hiring order to remedy past practices of discriminatory hiring).

In November 1977, 100 of 225 SAPD officers took a written examination to become Sergeant. Following the examination, the City Personnel Department proposed that the passing score be adjusted to enable more Hispanic officers to pass the written examination and become eligible to compete in the oral examination for the position of Sergeant. The chief of police did not support the proposal. It was not implemented.

In December 1978, Sanchez, who was hired pursuant to the Bilingual Lateral Transfer Program, observed on the roll call

board a cartoon he considered to be racially offensive. Sanchez took a copy of the cartoon to the City Personnel Department. The police chief punished those involved in disseminating the cartoon. Sanchez also received an official reprimand for violating the chain of command by bringing the cartoon to the attention of the City Personnel Department, rather than the proper SAPD officials.

On January 9, 1978, Sanchez, Caro and Torres, together with other members of the SAPD, chartered an Orange County chapter of the Latino Peace Officers Association (LPOA), with Caro as president and Torres as vice-president. At a January 13, 1978 meeting between Chief Davis and minority officers, Caro, on behalf of the LPOA, presented Chief Davis with a packet of materials detailing racial problems within the SAPD (the "LPOA Packet"). Pursuant to Chief of Police Davis's instructions, Lieutenant Salazar and Lieutenant Lewellen were assigned to investigate the allegations as well as the cartoon incident. The lieutenants prepared a report for Chief Davis. The report found no racial problems, noted some isolated incidents of offensive language, and characterized some minority officers as "super-sensitive."

According to the plaintiffs, LPOA members during the next few months, became targets of selective enforcement of SAPD rules and of peer ostracism. They also claim that various defendants made racially offensive slurs. The complaints alleged that LPOA members resigned from the organization because of their fears of ostracism and discrimination by defendants. Plaintiffs also alleged that unsafe vehicles were assigned to LPOA members and that they did not receive adequate police back-ups during certain operations. Sanchez and Torres claim that secret and illegal personnel files were kept on them by various defendant-supervisors.

On January 13, 1978, Caro complained to Lieutenant Williams, his supervisor, that Bannon, an Anglo officer, used

unnecessary force during an arrest. The allegations prompted an investigation by Bannon's supervisor, Lieutenant Dixon, but no charges resulted. Caro complained to Lieutenants Williams and Jordan, Sergeants Dittus, and Garza (the Affirmative Action Officer), that Dixon was biased.

Following the investigation, Chief Davis terminated Caro's employment on the ground that his allegation against Bannon was unfounded and made with evil intent. The termination statement also said that Caro was untruthful during the subsequent investigation. Despite Caro's contention that the investigation was biased and hostile to him, due to his involvement with the LPOA, the termination was upheld by the Santa Ana Personnel Board, the California Superior Court, and the California Court of Appeals.

Following Caro's discharge, Torres made a public statement regarding continued discrimination at the SAPD. Although he was not formally reprimanded, Torres was reminded of his duty to present discrimination claims within the SAPD before airing his grievances to the public.

In January of 1978, Torres applied for the position of Assistant Team Leader (ATL) for the patrol division, and, based on his 1977 test scores, he was next in line for the position. The list expired, however, and in March of 1978, Torres submitted his application to an ATL oral board (Lieutenants Lewellen and Sterzer and Sergeant Bruns). Torres testified that he was questioned about and orally reprimanded for his involvement with the LPOA and the LPOA Packet. Torres never became an ATL.

In September of 1978, Torres requested a leave of absence to attend to his ill parents. His request was denied. Torres then appealed and was granted a one-week leave. At the end of the week he voluntarily resigned from the SAPD. In an April, 1979 letter to Personnel Director Botts, Torres stated that he resigned to assist his parents. Torres now claims, how-

ever, that he was constructively discharged as a result of racial discrimination.

In March of 1979, Sanchez also resigned from the SAPD. He claims that he was constructively discharged following the removal of his merit pay. *See Sanchez*, slip op. at —.

On May 18, 1979, Sanchez, Torres and Caro filed a complaint seeking damages and injunctive relief for violations of their civil rights.¹ Plaintiffs moved for full discovery of SAPD personnel files and the defendants sought a protective order to limit plaintiffs' discovery. The court granted the protective order in part, limiting plaintiffs' discovery to (1) statistical data, compiled by the SAPD, regarding the number of full-time, permanent members of the SAPD who were discharged or who resigned while under investigation, between February 1973 and July 1979 and (2) comparative data regarding the compensation of members of the SAPD between May 1975 and July 1979, with no identification of individual members beyond ethnic and sex classifications. The court's grant of the protective order was without prejudice to the plaintiffs' moving for production of the protected material if the action were certified as a class action. The plaintiffs thereafter moved for class certification on behalf of all Hispanic officers, pursuant to Fed. R. Civ. P. 23(b)(1), (b)(2), which the district court denied on February 26, 1980.

Defendants moved to dismiss or in the alternative for summary judgment or partial summary judgment. Partial summary judgment was granted to defendants as to (1) all issues concerning defendants' hiring practices; (2) Sanchez's com-

¹On June 13, 1978, Sanchez filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC). On May 17, 1978, Torres filed a similar charge with the EEOC. On March 7, 1978, Caro also filed a charge with the EEOC. Plaintiffs received a right-to-sue letter from the U.S. Department of Justice on April 11, 1979 and timely instituted this civil action in federal district court on May 18, 1979. *See* 42 U.S.C. § 2000e.

plaints based on his failure to get Crime Scene Investigator pay; (3) Torres's claim of discrimination for failure to promote him to Sergeant; and (4) all generalized claims of a disparate impact from disciplinary proceedings being more frequent towards Hispanics than others. Defendants were also granted partial summary judgment as to all of Caro's pre-termination claims. Caro's pre-termination claims were precluded by his state proceedings, but Caro's post-termination claims were preserved.

Sanchez was granted summary judgment against the City of Santa Ana on his claim of denial of due process in removal of his merit pay, but was denied summary judgment on his first amendment discriminatory retaliation claim. Following thirty-nine days of trial, a verdict was directed in favor of the defendants on all remaining claims. The court, as noted in the companion appeal, referred Sanchez's claims for damages to the jury.

The City moved for judgment notwithstanding the verdict or for a new trial and both motions were denied. The defendants' motions for attorney's fees were granted and defendants were awarded \$471,558.71. Sanchez's motion for determination of prevailing party status was granted on his due process claim but denied on his other claims; he was denied attorney's fees and costs.

JURISDICTION

All but five of the defendants² contend that this court lacks jurisdiction over this appeal because the district court improperly vacated Fed. R. Civ. P. 54(b) certification of the final directed verdict judgments, and the plaintiffs did not

²Defendants Collins, Dittus, Faust, Lanner and McDaniel.

timely appeal from the certified judgment. We reject this contention.³

In directing a verdict on most of the plaintiffs' claims, the district court ordered the defendants to prepare a judgment in conformance with the directed verdict. There is no indication in this order that the court directed the judgment to be certified under Fed. R. Civ. P. 54(b).⁴

On December 4, 1985, the defendants filed a proposed judgment reciting that there was no just reason for delay, and directing that judgment be entered forthwith pursuant to Rule 54(b). The district court entered the judgment and served it on all the parties. It is undisputed that the plaintiffs failed to file a notice of appeal within thirty days of this judgment, as required by Fed. R. App. P. 4.

At a hearing on February 24, 1986, the plaintiffs argued that the December 5, 1985 judgment was not appealable because the district court had not intended to certify the judgment under Rule 54(b). The plaintiffs reminded the court that on December 9, 1985, four days after entry of judgment, the court had indicated that it intended there be only a single, final judgment from the case. At a March 10, 1986 hearing on the plaintiffs' motion to correct the judgment, the court stated that it never intended to certify the judgment under Rule 54(b) and vacated the 54(b) certification.

³A motions panel of this court has previously ruled that this court has jurisdiction over the plaintiffs' appeal. While this court gives deference to motions panel decisions made in the course of the same appeal, we have an independent duty to decide whether we have jurisdiction. *See Schlegel v. Bebout*, 841 F.2d 937, 941 (9th Cir. 1988).

⁴Rule 54(b) provides in part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

Fed. R. Civ. P. 60(a) provides that clerical mistakes in judgments arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. "The error can be corrected whether it is made by a clerk or by the judge." *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987).

In deciding whether the district court may alter a judgment pursuant to Rule 60(a), our focus is on what the court originally intended to do. *Id.* Rule 60(a) is limited, however, to correcting errors "arising from omission" and may not be used to correct more substantial errors, such as errors of law. *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (per curiam).

The situation here falls under Rule 60(a). The district judge stated on the record that he never intended to grant 54(b) certification. We find no reason to doubt the district judge's statements, particularly in light of his failure to direct the defendants to include 54(b) certification in the final judgment he asked them to prepare. *See Blanton*, 813 F.2d at 1577. Accordingly, the error arose from oversight or omission and was within the district court's power to correct under 60(a). *See Waggoner*, 743 F.2d at 644.⁵

PROTECTIVE ORDER

[1] Plaintiffs claim that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled

⁵The defendants contend that the district court did not have the authority to correct the judgment under Rule 60(a) because the rule may not be used to correct substantial errors. By "substantial" errors, the court means non-clerical errors; it is not referring to the magnitude of the error. *Waggoner*, 743 F.2d at 644-45. Because the district court's error was clerical, it was within the district court's power to correct the judgment under 60(a).

statistical data. Defendants correctly argue that the protective order was proper because of the confidential nature of the requested files.

[2] Federal Rule of Civil Procedure 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. *Kerr v. United States Dist. Ct. for N.D. Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). Government personnel files are considered official information. *See, e.g., Zaustinsky v. University of Cal.*, 96 F.R.D. 622, 625 (N.D. Cal. 1983), *aff'd*, 782 F.2d 1055 (9th Cir. 1985). To determine whether the information sought is privileged, courts must weigh the potential benefits of disclosure against the potential disadvantages. If the latter is greater, the privilege bars discovery. *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980); *Zaustinsky*, 96 F.R.D. at 625.

The relevance of plaintiffs' discovery request for employment data is undisputed. Most of the relevant information, however, could have been developed by interrogatories. It is well-settled that an employee may prove his or her claim of unlawful discrimination by evidence that other employees of different races or national origin were treated differently in similar circumstances. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362-63 (9th Cir. 1985). Statistical evidence alone may make out a prima facie case of unlawful discrimination. *Wards Cove Packing Co., Inc. v. Antonio*, — U.S. —, 109 S. Ct. 2115, 2121 (1989).

Plaintiffs seek more than statistical data of officer employment termination, discipline and compensation. They demanded access to the SAPD's personnel files to compile their own statistics. While these files are not absolutely privileged, the confidential nature of the employee personnel files suggests that opening the files to the plaintiffs for a general

search could reach well beyond the legitimate inquiries necessary to this litigation and would impact disciplinary procedures within the SAPD. The SAPD claims that the files contain additional confidential information that is irrelevant to plaintiffs' suit.

[3] The district court did not abuse its discretion in denying access to these files. See *Ah Moo v. A.G. Becker Paribas, Inc.*, 857 F.2d 615, 619 (9th Cir. 1988). While plaintiffs demonstrate the relevance of statistics to their suit, they fail to show that discovery of the actual files was necessary. Focused discovery could have been employed. Plaintiffs accuse the defendants of inaccurate statistical conclusions, but they were free to utilize the statistics to draw their own conclusions. In addition, the plaintiffs had access to the same EEOC data from which the SAPD's expert compiled the statistics in question, and, when investigating a charge, the EEOC has "a broad right of access to relevant evidence." *University of Pa., Petitioner v. Equal Employment Opportunity Commission*. — U.S. —, 110 S. Ct. 577, 583 (1990) (citing 42 U.S.C. § 2000e-8(a)). The SAPD's expert did not draw conclusions from the files themselves but from the EEOC data. Plaintiffs have not alleged that the EEOC data is biased or that they were denied access to this data. They fail to show prejudice from the denial of their full discovery request.

SUMMARY JUDGMENT ON PAY AND PROMOTION CLAIMS

[4] Plaintiffs claim that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions, have a discriminatory impact on Hispanic officers hired laterally from other police departments.⁶ Plaintiffs challenge the

⁶Officers hired laterally from other police departments enter as "step C" employees as compared to rookie police officers who enter at "step A." Advancement to steps D and E is based on merit.

district court's finding that these pay and promotion claims were governed by *LULAC*, 410 F. Supp. 873 (C.D. Cal. 1976). We agree that the district court misapplied *LULAC*.

[5] In *LULAC* the district court held that the City of Santa Ana engaged in discriminatory hiring practices that resulted in disproportionately few Mexican-American police or firemen. 410 F. Supp. at 911-12. The suit was brought in 1974 by a rejected Hispanic police applicant and by the League of United Latin American Citizens on behalf of its members. Finding unlawful discrimination, the district court also mandated that a preferential hiring order be instituted in future proceedings. *Id.* at 911. The district court in the instant case held that *LULAC* governed "all aspects of *lateral* transfers including credits, salary and classification." (emphasis added). *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from those policies. *LULAC* only addresses hiring policies for new applicants to the police force. Moreover, the bilingual lateral transfer program began in 1974-75 following the initiation of the *LULAC* suit. Because the district court erroneously applied *LULAC* we reverse the district court's grant of summary judgment on this issue and remand for consideration of the plaintiffs' claim.

SUMMARY JUDGMENT ON OTHER DISPARATE IMPACT CLAIMS

Plaintiffs alleged that the defendants enforced City and department regulations in a racially and ethnically discriminatory fashion. On the basis of the defendants' statistical data, which did not reveal any discrimination, the district court granted summary judgment to defendants on all generalized claims of disparate impact from disciplinary proceedings.

On appeal, plaintiffs challenge this summary judgment because they were denied equal access to personnel files

which they claim would have allowed them to compile contradictory statistics and challenge defendants' evidence. As discussed previously, this claim has no merit.

DENIAL OF CLASS CERTIFICATION

[6] Sanchez, Torres, and Caro brought this action as individuals and as a class on behalf of all Spanish-surnamed individuals employed by the City as police officers, past, present and future, pursuant to Fed. R. Civ. P. 23(a), (b)(1), (b)(2). The district court denied class certification primarily upon a finding that the three no-longer-employed plaintiffs failed to meet the commonality and typicality requirements of Fed R. Civ. P. 23(a)(2) & (3). This ruling is correct.

On appeal plaintiffs argue that the denial of equal access to the personnel files prevented them from specifically alleging commonality or typicality. As previously noted, this claim has no merit and the district court did not abuse its discretion in refusing to certify this class. *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, — U.S. —, 110 S. Ct. 69 (1989); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 779 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986).

CARO'S PRE-TERMINATION CLAIMS

[7] Caro claims that the district court erred in granting summary judgment to defendants on his pre-termination claims based on a finding that the claims were barred by res judicata. We affirm the district court.

Following Caro's termination from the SAPD, he appealed the dismissal to the Personnel Board of the City of Santa Ana seeking a reversal and reinstatement. The Personnel Board denied his requests, and Caro instituted an action in the California Superior Court seeking the same relief. He lost in the Superior Court and appealed to the Court of Appeals where he also lost. The Court of Appeals specifically found that Caro

was afforded a full and fair hearing at the Personnel Board and that there was no bias or prejudice, racial or otherwise, involved in, or causing his discharge. The court also held that there were no due process violations. In response to the res judicata defense in the district court, Caro argued that the defendants conspired to obstruct justice and deter witnesses who might have testified on his behalf in violation of 42 U.S.C. § 1985(2).

It is well-established that where a federal constitutional claim is based on the same asserted wrong as a state action and the parties are the same, res judicata will bar the federal constitutional claim, whether or not it was asserted specifically in state court. 28 U.S.C. § 1738 (1982); *Trujillo v. County of Santa Clara*, 775 F.2d 1359, 1363 (9th Cir. 1985); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), *cert. denied*, 423 U.S. 1066 (1976).

[8] In California, to whose law we must look for the applicable res judicata and collateral estoppel principles, *Punton v. City of Seattle*, 805 F.2d 1378, 1380 (9th Cir. 1988), *cert. denied*, 481 U.S. 1029 (1989), res judicata precludes a plaintiff from litigating a claim if the claim "relates to the same 'primary right' as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action." *Trujillo*, 775 F.2d at 1366, (citing *Slater v. Blackwood*, 15 Cal.3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (Cal. 1975)). Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action. Moreover, he could have raised the specific allegation of conspiracy to obstruct justice in his state court proceedings.

Caro argues that he was not afforded a full and fair opportunity to litigate the claim in the state court and, accordingly, he should not be barred from litigating his pre-termination claims in federal court. We reject this contention.

Collateral estoppel does not apply when the party against whom it is asserted did not have a "full and fair opportunity" to present the case. *Kremer v. Chemical Constr.*, 456 U.S. 461, 480-81 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980). The Supreme Court has stated, however, that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. Caro claims that Community Service Officer Christine Schuller was intimidated by various defendants and as a result would not testify on his behalf. He failed, however, to produce proof of that assertion. Moreover, Caro does not claim, and we do not find, that the California courts violated minimum standards of due process.

Caro also contends that issue and claim preclusion should not apply to claims brought under 42 U.S.C. § 1985(2). While the Supreme Court has not stated specifically that claim and issue preclusion principles apply to section 1985(2) conspiracy claims, it has held these principles applicable to Title VII and section 1983 suits. See *Migra v. Warren City School Dist. Bd of Ed.*, 465 U.S. 75 (1984) (state preclusion law applies to section 1983 claims); *Kremer*, 456 U.S. at 461 (claim and issue preclusion apply to Title VII actions). Moreover, in *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd*, *Kush v. Rutledge*, 460 U.S. 719 (1983) we afforded full faith and credit to state judicial proceedings involving an athlete's claim that he was assaulted by his coach and that the team engaged in a cover-up of the incident in violation of section 1985(2). Likewise, we conclude that Caro's claim that justice was obstructed during the Personnel Board and state court proceedings is barred.

DIRECTED VERDICTS

Following the completion of the plaintiffs' oral presentation of evidence, defendants were granted directed verdicts

on all remaining claims. Plaintiffs appeal the verdicts on the following claims: (1) The existence of a racially discriminatory atmosphere; (2) The unlawful retaliation against the plaintiffs for engaging in protected speech; (3) The discrimination and retaliation based on race and national origin; and (4) The conspiracies against plaintiffs due to their exercise of first amendment rights, their race and national origin, and defendants' obstruction of justice.

A. Discriminatory Environment

[9] Plaintiffs allege the existence of a racially discriminatory atmosphere at the SAPD in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e. They claim that enough evidence was presented that a reasonable jury could have found the existence of a hostile work environment. . . . This is a mischaracterization of the record. We affirm judgment to the defendants.

Plaintiffs do not distinguish between their causes of action under section 1981 and Title VII. They contend that parallel claims under section 1981 and Title VII should be assessed by like standards. The Supreme Court has stated, however, that while there is a "necessary overlap" between these two statutes, section 1981 does not apply to post-contract formation conduct unrelated to an employee's right to enforce his or her contract. *Patterson v. McLean Credit Union*, — U.S. —, 109 S. Ct. 2363, 2374-75 (1989). Title VII, on the other hand, applies to racial harassment in the course of employment. *See id.* at 2374; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986) (Court discusses Title VII's application to sexual harassment). Because plaintiffs' hostile atmosphere claim does not involve specific allegations of a refusal to make a contract or the impairment of their ability to enforce contract rights, it should be analyzed under Title VII. *Patterson*, 109 S. Ct. at 2374.⁷

⁷Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual

In the district court's pretrial order, it was agreed that Title VII claims would not be tried by a jury. We have held that a jury trial need not be provided in Title VII cases. *See Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); *cf. Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (where plaintiff brings an equitable discrimination claim under Title VII and a legal claim under section 1981 based on the same facts, the trial judge must follow the jury's factual findings), *cert. denied*, — U.S. —, 110 S. Ct. 1524 (1990). Accordingly, even if plaintiffs' discriminatory atmosphere claim is meritorious, we may not remand it for a jury determination.

In moving for a directed verdict, the defendants did not distinguish between plaintiffs' Title VII and 1981 claims. Likewise, in directing a verdict the district court did not make this distinction. The court found simply that "no reasonable person could find for the plaintiffs." In our review, however, we must make this distinction. We are not deciding whether the district court improperly took the issue away from the jury, but whether the district court erred in deciding the issue without hearing from the defense.

Federal Rule of Civil Procedure 41(b) allows the district judge presiding over a bench trial to decide the case following the close of the plaintiffs' case. In *Johnson v. United States Postal Service*, 756 F.2d 1461, 1464 (9th Cir. 1985), we held that a district court's factual findings made pursuant to Rule 41(b) should be reviewed under the clearly erroneous standard. We also held that ultimate findings under Rule 41(b) are mixed questions of law and fact and are reviewed *de novo*. *Id.* at 1465. While the defendants did not make a Rule 41(b) motion, their motion for a directed verdict at the close of

with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (1988).

plaintiffs' case on an issue that will ultimately be decided by the judge has the same effect. Accordingly, we adopt the same standard of review.

We cannot say that the district court's ultimate conclusion, that the plaintiffs failed to prove the existence of a discriminatory atmosphere, is incorrect as a matter of law. The "directed verdict" is affirmed.

B. First Amendment Claims

[10] Sanchez and Torres allege that they were unlawfully retaliated against for exercising their first amendment rights in violation of 42 U.S.C. § 1983. Our review of the record indicates that reasonable jurors could find retaliation on one or more of these claims. These claim are remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, and Lieutenant Williams to Sanchez,⁸ and the potential liability of Lieutenants Lewellen, Sterzer and Pitzer and Sergeant Bruns to Torres. The directed verdicts in favor of the City and the remaining defendants are affirmed. The specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers. Public entities are liable under section 1983 only when the constitutional violation occurs as a result of a policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-91 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122-23 (1988). Plaintiffs failed to prove the existence of such a policy or custom.

"To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of

⁸In this appeal, we do not consider Sanchez's claims of retaliation for first amendment protected activity where the alleged retaliation is poor reviews and the removal of his merit pay. These claims are the same as those for which he received a jury verdict. See *Sanchez v. City of Santa Ana*, 915 F.2d 424, 426-28, 430-31 (9th Cir. 1990.)

state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1313-14 (9th Cir. 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). A violation of section 1983 occurs where an employee is wrongfully retaliated against for speech protected by the first amendment. See *Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ. of Township High School Dist. 205, Will County Ill.*, 391 U.S. 563 (1968); *Allen v. Striber*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (1987).

To make a successful claim for wrongful retaliation under the first amendment and section 1983, the plaintiff must prove that: (1) the statement that brought on the retaliation is one of "public concern;" (2) the constitutionally protected expression is a "substantial" or "motivational" factor in the employer's adverse decision or conduct; and (3) the interests of the plaintiff/employee in commenting on the matter of public concern outweigh the state's interest in maintaining efficient public services. See *Allen*, 812 F.2d at 430-32. The defendants concede or do not contest that the incidents alleged by Sanchez and Torres are protected under the first amendment.

Sanchez and Torres testified to numerous instances that a reasonable jury could have found to be unconstitutional retaliation. Plaintiffs testified that the above identified defendants reacted adversely to the formation of the LPOA, the LPOA meeting with city personnel, the submission of the LPOA packet, the filing of EEOC complaints, the instigation of legal activity, Torres's press conference, and Sanchez's and Torres's public support of Caro following his discharge. Moreover, both Sanchez and Torres testified to being ostracized and victims of a "silent treatment" and of selective enforcement of the rules, and Torres claimed that he was penalized in his interview for the ATL position and received poor

reviews. These claims of first amendment retaliation are therefore remanded for submission to the jury. Sanchez and Torres are entitled to a jury determination of whether the first amendment has been violated, and by whom, and what damages, if any, would be required to repair any injuries caused by the alleged retaliation.

The evidence, however, does not support a claim that the SAPD's policy of bringing grievances to authorities in the SAPD before bringing them to the City or the public, was unreasonable as to Sanchez. The Supreme Court has held that a public employer can impose reasonable limitations on the manner that employer grievances are handled. *Connick*, 461 U.S. 138. "The problem . . . is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public service it performs through its employees." *Pickering*, 391 U.S. at 568.

In applying this test, we have held that a police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees. *Allen*, 812 F.2d at 432; *Boyd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977) (court refuses to expunge reprimands from personnel files of officers who issued public statements about the police department's stop and frisk tactics), *cert. denied*, 434 U.S. 1087 (1978). The SAPD's policy of bringing grievances first through appropriate channels to authorities in the department before bringing them to the City or the public is reasonable and not arbitrary. There was no constitutional violation in requiring officers to communicate "through channels" before enlisting public opinion to their cause.

C. Discrimination/Retaliation

All three plaintiffs claim that substantial evidence was presented to sustain their allegations that the defendants vio-

lated sections 1981, 1983, and Title VII by retaliating against them because of their race. Their claims are founded on the fourteenth amendment's equal protection and due process clauses. This directed verdict is affirmed. Caro's claims are barred. Sanchez received favorable verdicts from the jury on his separate fourteenth amendment due process claim.⁹ There is no evidence to support Torres's claims; his grievances are best addressed under the first amendment analysis discussed previously.

D. Conspiracies

Plaintiffs claim that substantial evidence supports the inference of a single conspiracy managed and implemented by Chief Davis and Captain Hansen and involving all other defendants. They allege the same incidents of first amendment protected activities to support their conspiracy claim under section 1983. While we agree that enough evidence exists to reverse many of the directed verdicts, we do not find evidence to support a conspiracy claim under 42 U.S.C. § 1983.

Plaintiffs also claim that the defendants conspired to obstruct justice by deterring witnesses from testifying on behalf of Caro and by presenting false evidence at Caro's termination hearing depriving them of equal protection under the law in violation of 42 U.S.C. §§ 1985(2), 1986. This claim is meritless.

Section 1985 proscribes conspiracies to interfere with civil rights. A claim brought under the first and second clauses of section 1985(2) requires a direct or indirect purpose to deprive any persons of the equal protection of the laws, or the equal privileges or immunities under the laws and a class

⁹Our decision to vacate the award of \$500,000 for emotional distress injury because it is barred by principles of res judicata, see *Sanchez*, 915 F.2d at 431-32, does not affect our decision here.

race-based animus. See *Kush*, 460 U.S. 719; *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Bretz v. Kelman*, 773 F.2d 1026, 1028 (9th Cir. 1985) (en banc). To be actionable, the conspiracy must result in overt acts, done in furtherance of the conspiracy, that are both the cause in fact and proximate cause of plaintiffs' injuries. See *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A mere allegation of conspiracy without factual specificity is insufficient to support a claim. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988).

Plaintiffs allege the required class — Hispanic police officers — but their evidence of a conspiracy to obstruct justice aimed at the class is lacking. The basis of their claim is that state court proceedings were obstructed when defendants allegedly intimidated Officer Schuller from testifying on Caro's behalf. As noted above, this claim is barred by res judicata. Moreover, defendants have presented uncontroverted evidence that Schuller refused to testify of her own free will.

Plaintiffs also claim that Officer Fernandez was influenced to suppress evidence that Sergeant Dixon, who originally investigated Caro's complaint against Officer Bannon, was hostile to Caro. Plaintiffs presented evidence that Fernandez lied to the Personnel Board about his knowledge of Sergeants Dixon's potential bias. Even viewing this evidence in Caro's favor, however, one incident does not amount to substantial evidence of a conspiracy to obstruct justice directed at the class of Hispanic police officers.¹⁰

Likewise, plaintiffs' claim against the individual defendants under section 1986 is meritless. "Section 1986 imposes

¹⁰Plaintiffs also allege that Chief Davis lied about the handling of the Caro matter when he testified in the state proceedings and that Lieutenant Williams inflated his state court testimony of Caro's excessive force charge. Neither of these incidents, however, evidence a conspiracy between two or more SAPD members.

liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation." *Karim-Panahi*, 839 F.2d at 626. A violation of section 1986 thus depends on the existence of a valid claim under 1985. *Id.*; *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985); *Mollnow v. Carlton*, 716 F.2d 627, 632 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

INDIVIDUAL LIABILITY ON REMAND

[11] The individual defendants contend that they are immune from liability. We address their claim to guide the district court upon remand, and hold that the district court erred in ruling that the defendants were entitled to immunity because the law in this area was insufficiently clear. On remand, however, the court should also consider whether any of the defendants were performing discretionary functions and enjoyed qualified immunity for their actions on that basis.

Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Good faith qualified immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." *Id.* See also *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (the contours of the right must be sufficiently clear to a reasonable official so that the actor would have understood that what he was doing violated that right).

[12] The causes of action upon which we reverse the directed verdict involve particular rights that were clearly established at the time of the alleged incidents. See *Connick v. Myers*, 461 U.S. 138 (1983) ("for at least 15 years, it has been settled that a State cannot condition public employment

on a basis that infringes the employee's constitutionally protected interests in freedom of expression."); *Gutierrez v. Municipal Ct. of Southeast Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1050-51 (9th Cir. 1988) (governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination), *vacated on mootness grounds*, — U.S. —, 109 S. Ct. 1736 (1989); *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir.) ("[n]o official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it."), *cert. denied*, 449 U.S. 875 (1980); *Rogers*, 454 F.2d at 238 (racially discriminatory atmosphere claim is actionable under Title VII).

ATTORNEY'S FEES

Upon post-trial motion, the Sergeant-defendants and the other nine individual defendants were awarded attorney's fees under 42 U.S.C. § 1988. Plaintiffs challenge these awards.

The district court found that the plaintiffs abused the legal process and dragged innocent individuals through the court system. Plaintiffs contend that, because many of the defendants' motions for summary judgment were denied, their claims have merit and attorney's fees were improperly awarded against them. Both sides claim too much from the record. Court time was wasted by both sides, some of it on groundless claims by plaintiffs, some of it by litigation-happy defense tactics. The meters in the law offices were running, but fee shifting was not warranted in this case.

Under section 1988 a court may award attorney's fees to a prevailing defendant if the court finds that the plaintiff's action is "frivolous, unreasonable, or without foundation."

Christiansburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412 (1978). See also *Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980) (applying *Christiansburg* to 42 U.S.C. § 1983 case). In *Jensen v. Stangel* we held that denials of motions to dismiss and summary judgment may suggest that a plaintiff's claims are not without merit. 762 F.2d 815, 818 (9th Cir. 1985). While defendants are correct in noting that in *Jensen* we reversed the attorney's fees award primarily upon other grounds, *Jensen* nevertheless, provides guidance.

As in *Jensen*, two trial judges presided over different parts of these proceedings. By denying many of defendants' motions for summary judgment, Judge Hill apparently believed that parts of the plaintiffs' case had enough merit to proceed to the next stage of litigation. Judge Kenyon, after hearing 39 days of trial, found that most of the claims were not proven or were otherwise barred. Logic and fairness dictate that where two judges disagree, attorney's fees should not be awarded en gross for bringing a frivolous case.

Massive fee awards against plaintiffs who continue to trial are contrary to Congress' goal of "promoting vigorous prosecution of civil rights violations under Title VII and § 1983." *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 619 (9th Cir. 1987). We therefore reverse the district court's award of attorney's fees. To the extent that the City had to finance heavy defense costs, there is abundant evidence in this record that the City could have avoided much of the problem by employing a less confrontational approach to departmental grievances after having recently been through, and losing, the *LULAC* litigation.

We need not address whether the allocation of the burden of the fee award was an abuse of discretion because we hold that no award was warranted.

The district court abused its discretion in denying attorney's fees to Sanchez. A plaintiff in a civil rights suit is a pre-

vailing party and is entitled to an award of attorney's fees if he "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" *Texas State Teachers Ass'n v. Garland Independent School Dist.*, — U.S. —, 109 S. Ct. 1486, 1493 (1989). We remand to the district court to award reasonable attorney's fees in connection with that part of the verdict affirmed in the City's companion appeal, *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990).

The parties will bear their own costs of appeal.

AFFIRMED IN PART, REVERSED IN PART AND
REMANDED.

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Appendix G.32

APPENDIX H

THE
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FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JESSE J. SANCHEZ; VICTOR TORRES;
ROBERT CARO,
Plaintiffs-Appellants.

v.

CITY OF SANTA ANA; CITY OF
SANTA ANA POLICE DEPARTMENT;
DON BOTTS; RAYMOND C. DAVIS; E.
B. HANSEN; ROBERT STEBBENS;
NORWOOD WILLIAMS; LEE
DRUMMOND; LAWRENCE PITZER;
MICHAEL LEWELLEN; DALE STERZER;
GARY DIXON; JOHN COLLINS; JOHN
MCDANIELS; MICHAEL LANNERS;
WILLIAM BRUNS; JOHN DITTUS;
RICHARD FAUST; JOHN MCCLAIN,
Defendants-Appellees.

Nos. 85-6504;
86-6226, 87-5614,
88-5853

D.C. No.
CV-79-1818-KN

ORDER AND
AMENDED
OPINION

Appeal from the United States District Court
for the Central District of California
David V. Kenyon, District Judge, Presiding*

Argued and Submitted
December 4, 1989—Pasadena, California

Filed July 11, 1990
Amended May 24, 1991

Before: Alfred T. Goodwin, Chief Judge,
Mary M. Schroeder and Diarmuid F. O'Scannlain,
Circuit Judges.

*Judge Irving Hill, District Judge for the Central District of California,
presided over many of the pretrial orders.

Opinion by Chief Judge Goodwin

SUMMARY

Constitutional Law

Affirming in part, reversing in part, and remanding judgments of the district court, the court of appeals held that summary judgment in favor of the City of Santa Ana was improper because the district court misapplied *League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976), to former police officers' claims of discriminatory lateral promotion policies.

Appellants Jesse Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department, appealed district court judgments in their action against the City of Santa Ana and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a).

[1] Appellants claimed that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. [2] F.R. Civ. P. 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. [3] The district court did not abuse its discretion in denying access to these files. While appellants demonstrated the relevance of statistics to their suit, they failed to show that discovery of the files was necessary. Focused discovery could have been employed. Appellants failed to show prejudice from the denial of their full discovery request.

[4] Appellants contended that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions, have a discriminatory impact on Hispanic officers laterally hired from other police departments. Appellants challenged the district court's finding that these pay and promotion claims were governed by *LULAC*. The court agreed that the district court misapplied *LULAC*. [5] The district court in this case held that *LULAC* governed all aspects of lateral transfers including credits, salary and classification. *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from these policies. Moreover, the bilingual lateral transfer program began in 1974-1975 following the initiation of the *LULAC* suit. Because the district court misapplied *LULAC*, the court reversed the grant of summary judgment on this issue and remanded for consideration of appellants' claim.

[6] The district court denied class certification primarily upon a finding that the three no-longer-employed appellants failed to meet the commonality and typicality requirements, and the court found this ruling to be correct.

[7] Caro claimed that the district court erred in granting summary judgment to appellees on his pre-termination claims based on a finding that the claims were barred by res judicata. [8] In California, to whose law the court looked for the applicable res judicata and collateral estoppel principles, res judicata precludes a plaintiff from litigating a claim if the claim relates to the same primary right as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action. Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action.

[9] Appellants alleged the existence of a racially discriminatory atmosphere at the SAPD, contending that enough evi-

dence was presented that a reasonable jury could have found the existence of a hostile work environment. This was a mischaracterization of the record. The court thus affirmed judgment to the defendants.

[10] Sanchez and Torres alleged that they were unlawfully retaliated against for exercising their first amendment rights. Because the court's review of the record indicated that reasonable jurors could find retaliation on one or more of these claims, the court remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, Lieutenant Williams and Sergeant Dittus to Sanchez, and the potential liability of Lieutenants Lewellen, Sterzer, and Pitzer and Sergeant Bruns to Torres. The court affirmed the directed verdicts in favor of the City and the remaining defendants, holding that the specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers.

[11] The individual appellants contended that they are immune from liability, but the court held that the district court erred in ruling that the appellants were entitled to immunity because the law in this area was insufficiently clear. [12] The causes of action upon which the court reversed the directed verdict involved particular rights that were clearly established at the time of the alleged incidents. For at least fifteen years, it has been settled that a state cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression. Governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination.

COUNSEL

Meir J. Westreich, Glendale, California, for the plaintiffs-appellants.

Charles Matheis, Jr., Santa Ana, California; Larry J. Roberts, Orange, California; Daniel F. Fears, Paul, Hastings, Janofsky & Walker, Costa Mesa, California, for the defendants-appellees.

ORDER

The order and amended opinion filed February 27, 1991 is amended as follows:

Slip op. at 2216, line 7, following "fees": insert a comma after the word "fees" and then insert "including fees on appeal,"

Slip op. at 2216, line 9, following "(9th Cir. 1990).": insert: "The district court shall determine the amount of fees that can be attributed to the part of Sanchez's appeal that was successful, and shall award reasonable attorney's fees and costs to the extent of Sanchez's success, both for the work in the district court and on appeal."

Slip op. at 2216, 1st full paragraph: delete: "The parties will bear their own costs of appeal."

With these amendments the petition for rehearing is denied. Judges Schroeder and O'Scannlain have voted to reject the suggestion for rehearing en banc, and Judge Goodwin so recommends.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

Plaintiff's request for an extension of time within which to file a motion for attorneys' fees is now moot. This order has resolved the issue of attorneys' fees.

The mandate in this case is stayed for 90 days to permit the preparation and filing of a petition to the Supreme Court.

OPINION

GOODWIN, Chief Judge:

Jesse J. Sanchez, Victor Torres, and Robert Caro, former police officers of the Santa Ana Police Department (SAPD), appeal district court judgments in their action against the City of Santa Ana, and various Police Captains, Lieutenants and Sergeants for alleged deprivation of rights secured by the first and fourteenth amendments, in violation of 42 U.S.C. §§ 1981, 1983, 1985, 1986 and alleged employment discrimination by the City of Santa Ana in violation of 42 U.S.C. §§ 1981, 1983, 2000e-2(a). The City of Santa Ana also appeals. That appeal is addressed in *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990) (Nos. 86-6386, 88-5827, 88-5855).

Between 1975 and 1978, the number of Hispanic police officers at the SAPD greatly increased as a result of a Bilingual Lateral Transfer Program designed to encourage Spanish-speaking officers from other California police departments to transfer to the SAPD. *See generally League of United Latin Am. Citizens (LULAC) v. City of Santa Ana*, 410 F. Supp. 873 (C.D. Cal. 1976) (finding SAPD hiring practices unconstitutional and instituting a hiring order to remedy past practices of discriminatory hiring).

In November 1977, 100 of 225 SAPD officers took a written examination to become Sergeant. Following the examina-

tion, the City Personnel Department proposed that the passing score be adjusted to enable more Hispanic officers to pass the written examination and become eligible to compete in the oral examination for the position of Sergeant. The chief of police did not support the proposal. It was not implemented.

In December 1978, Sanchez, who was hired pursuant to the Bilingual Lateral Transfer Program, observed on the roll call board a cartoon he considered to be racially offensive. Sanchez took a copy of the cartoon to the City Personnel Department. The police chief punished those involved in disseminating the cartoon. Sanchez also received an official reprimand for violating the chain of command by bringing the cartoon to the attention of the City Personnel Department, rather than the proper SAPD officials.

On January 9, 1978, Sanchez, Caro and Torres, together with other members of the SAPD, chartered an Orange County chapter of the Latino Peace Officers Association (LPOA), with Caro as president and Torres as vice-president. At a January 13, 1978 meeting between Chief Davis and minority officers, Caro, on behalf of the LPOA, presented Chief Davis with a packet of materials detailing racial problems within the SAPD (the "LPOA Packet"). Pursuant to Chief of Police Davis's instructions, Lieutenant Salazar and Lieutenant Lewellen were assigned to investigate the allegations as well as the cartoon incident. The lieutenants prepared a report for Chief Davis. The report found no racial problems, noted some isolated incidents of offensive language, and characterized some minority officers as "super-sensitive."

According to the plaintiffs, LPOA members during the next few months, became targets of selective enforcement of SAPD rules and of peer ostracism. They also claim that various defendants made racially offensive slurs. The complaints alleged that LPOA members resigned from the organization because of their fears of ostracism and discrimination by defendants. Plaintiffs also alleged that unsafe vehicles were

assigned to LPOA members and that they did not receive adequate police back-ups during certain operations. Sanchez and Torres claim that secret and illegal personnel files were kept on them by various defendant-supervisors.

On January 13, 1978, Caro complained to Lieutenant Williams, his supervisor, that Bannon, an Anglo officer, used unnecessary force during an arrest. The allegations prompted an investigation by Bannon's supervisor, Lieutenant Dixon, but no charges resulted. Caro complained to Lieutenants Williams and Jordan, Sergeants Dittus, and Garza (the Affirmative Action Officer), that Dixon was biased.

Following the investigation, Chief Davis terminated Caro's employment on the ground that his allegation against Bannon was unfounded and made with evil intent. The termination statement also said that Caro was untruthful during the subsequent investigation. Despite Caro's contention that the investigation was biased and hostile to him, due to his involvement with the LPOA, the termination was upheld by the Santa Ana Personnel Board, the California Superior Court, and the California Court of Appeals.

Following Caro's discharge, Torres made a public statement regarding continued discrimination at the SAPD. Although he was not formally reprimanded, Torres was reminded of his duty to present discrimination claims within the SAPD before airing his grievances to the public.

In January of 1978, Torres applied for the position of Assistant Team Leader (ATL) for the patrol division, and, based on his 1977 test scores, he was next in line for the position. The list expired, however, and in March of 1978, Torres submitted his application to an ATL oral board (Lieutenants Lewellen and Sterzer and Sergeant Bruns). Torres testified that he was questioned about and orally reprimanded for his involvement with the LPOA and the LPOA Packet. Torres never became an ATL.

In September of 1978, Torres requested a leave of absence to attend to his ill parents. His request was denied. Torres then appealed and was granted a one-week leave. At the end of the week he voluntarily resigned from the SAPD. In an April, 1979 letter to Personnel Director Botts, Torres stated that he resigned to assist his parents. Torres now claims, however, that he was constructively discharged as a result of racial discrimination.

In March of 1979, Sanchez also resigned from the SAPD. He claims that he was constructively discharged following the removal of his merit pay. *See Sanchez*, slip op. at _.

On May 18, 1979, Sanchez, Torres and Caro filed a complaint seeking damages and injunctive relief for violations of their civil rights.¹ Plaintiffs moved for full discovery of SAPD personnel files and the defendants sought a protective order to limit plaintiffs' discovery. The court granted the protective order in part, limiting plaintiffs' discovery to (1) statistical data, compiled by the SAPD, regarding the number of full-time, permanent members of the SAPD who were discharged or who resigned while under investigation, between February 1973 and July 1979 and (2) comparative data regarding the compensation of members of the SAPD between May 1975 and July 1979, with no identification of individual members beyond ethnic and sex classifications. The court's grant of the protective order was without prejudice to the plaintiffs' moving for production of the protected material if the action were certified as a class action. The plaintiffs thereafter moved for class certification on behalf of all Hispanic officers, pursuant

¹On June 13, 1978, Sanchez filed a Charge of Discrimination with the United States Equal Employment Opportunity Commission (EEOC). On May 17, 1978, Torres filed a similar charge with the EEOC. On March 7, 1978, Caro also filed a charge with the EEOC. Plaintiffs received a right-to-sue letter from the U.S. Department of Justice on April 11, 1979 and timely instituted this civil action in federal district court on May 18, 1979. *See* 42 U.S.C. § 2000e.

to Fed. R. Civ. P. 23(b)(1), (b)(2), which the district court denied on February 26, 1980.

Defendants moved to dismiss or in the alternative for summary judgment or partial summary judgment. Partial summary judgment was granted to defendants as to (1) all issues concerning defendants' hiring practices; (2) Sanchez's complaints based on his failure to get Crime Scene Investigator pay; (3) Torres's claim of discrimination for failure to promote him to Sergeant; and (4) all generalized claims of a disparate impact from disciplinary proceedings being more frequent towards Hispanics than others. Defendants were also granted partial summary judgment as to all of Caro's pre-termination claims. Caro's pre-termination claims were precluded by his state proceedings, but Caro's post-termination claims were preserved.

Sanchez was granted summary judgment against the City of Santa Ana on his claim of denial of due process in removal of his merit pay, but was denied summary judgment on his first amendment discriminatory retaliation claim. Following thirty-nine days of trial, a verdict was directed in favor of the defendants on all remaining claims. The court, as noted in the companion appeal, referred Sanchez's claims for damages to the jury.

The City moved for judgment notwithstanding the verdict or for a new trial and both motions were denied. The defendants' motions for attorney's fees were granted and defendants were awarded \$471,558.71. Sanchez's motion for determination of prevailing party status was granted on his due process claim but denied on his other claims; he was denied attorney's fees and costs.

JURISDICTION

All but five of the defendants² contend that this court lacks

²Defendants Collins, Dittus, Faust, Lanner and McDaniel.

jurisdiction over this appeal because the district court improperly vacated Fed. R. Civ. P. 54(b) certification of the final directed verdict judgments, and the plaintiffs did not timely appeal from the certified judgment. We reject this contention.³

In directing a verdict on most of the plaintiffs' claims, the district court ordered the defendants to prepare a judgment in conformance with the directed verdict. There is no indication in this order that the court directed the judgment to be certified under Fed. R. Civ. P. 54(b).⁴

On December 4, 1985, the defendants filed a proposed judgment reciting that there was no just reason for delay, and directing that judgment be entered forthwith pursuant to Rule 54(b). The district court entered the judgment and served it on all the parties. It is undisputed that the plaintiffs failed to file a notice of appeal within thirty days of this judgment, as required by Fed. R. App. P. 4.

At a hearing on February 24, 1986, the plaintiffs argued that the December 5, 1985 judgment was not appealable because the district court had not intended to certify the judgment under Rule 54(b). The plaintiffs reminded the court that on December 9, 1985, four days after entry of judgment, the court had indicated that it intended there be only a single, final judgment from the case. At a March 10, 1986 hearing on

³A motions panel of this court has previously ruled that this court has jurisdiction over the plaintiffs' appeal. While this court gives deference to motions panel decisions made in the course of the same appeal, we have an independent duty to decide whether we have jurisdiction. See *Schlegel v. Bebow*, 841 F.2d 937, 941 (9th Cir. 1988).

⁴Rule 54(b) provides in part: "When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

the plaintiffs' motion to correct the judgment, the court stated that it never intended to certify the judgment under Rule 54(b) and vacated the 54(b) certification.

Fed. R. Civ. P. 60(a) provides that clerical mistakes in judgments arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders. "The error can be corrected whether it is made by a clerk or by the judge." *Blanton v. Anzalone*, 813 F.2d 1574, 1577 (9th Cir. 1987).

In deciding whether the district court may alter a judgment pursuant to Rule 60(a), our focus is on what the court originally intended to do. *Id.* Rule 60(a) is limited, however, to correcting errors "arising from omission" and may not be used to correct more substantial errors, such as errors of law. *Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) (per curiam).

The situation here falls under Rule 60(a). The district judge stated on the record that he never intended to grant 54(b) certification. We find no reason to doubt the district judge's statements, particularly in light of his failure to direct the defendants to include 54(b) certification in the final judgment he asked them to prepare. *See Blanton*, 813 F.2d at 1577. Accordingly, the error arose from oversight or omission and was within the district court's power to correct under 60(a). *See Waggoner*, 743 F.2d at 644.⁵

⁵The defendants contend that the district court did not have the authority to correct the judgment under Rule 60(a) because the rule may not be used to correct substantial errors. By "substantial" errors, the court means non-clerical errors; it is not referring to the magnitude of the error. *Waggoner*, 743 F.2d at 644-45. Because the district court's error was clerical, it was within the district court's power to correct the judgment under 60(a).

PROTECTIVE ORDER

[1] Plaintiffs claim that the district judge improperly issued a protective order denying them discovery of SAPD personnel files and allowing limited discovery of SAPD compiled statistical data. Defendants correctly argue that the protective order was proper because of the confidential nature of the requested files.

[2] Federal Rule of Civil Procedure 26(c) provides that a court may limit discovery to protect from annoyance, embarrassment, oppression, or undue burden or expense. Federal common law recognizes a qualified privilege for official information. *Kerr v. United States Dist. Ct. for N.D. Cal.*, 511 F.2d 192, 198 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976). Government personnel files are considered official information. *See, e.g., Zaustinsky v. University of Cal.*, 96 F.R.D. 622, 625 (N.D. Cal. 1983), *aff'd*, 782 F.2d 1055 (9th Cir. 1985). To determine whether the information sought is privileged, courts must weigh the potential benefits of disclosure against the potential disadvantages. If the latter is greater, the privilege bars discovery. *Jepsen v. Florida Bd. of Regents*, 610 F.2d 1379, 1384-85 (5th Cir. 1980); *Zaustinsky*, 96 F.R.D. at 625.

The relevance of plaintiffs' discovery request for employment data is undisputed. Most of the relevant information, however, could have been developed by interrogatories. It is well-settled that an employee may prove his or her claim of unlawful discrimination by evidence that other employees of different races or national origin were treated differently in similar circumstances. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804-805 (1973); *Diaz v. American Telephone & Telegraph*, 752 F.2d 1356, 1362-63 (9th Cir. 1985). Statistical evidence alone may make out a prima facie case of unlawful discrimination. *Wards Cove Packing Co., Inc. v. Antonio*, _ U.S. _, 109 S. Ct. 2115, 2121 (1989).

Plaintiffs seek more than statistical data of officer employment termination, discipline and compensation. They demanded access to the SAPD's personnel files to compile their own statistics. While these files are not absolutely privileged, the confidential nature of the employee personnel files suggests that opening the files to the plaintiffs for a general search could reach well beyond the legitimate inquiries necessary to this litigation and would impact disciplinary procedures within the SAPD. The SAPD claims that the files contain additional confidential information that is irrelevant to plaintiffs' suit.

[3] The district court did not abuse its discretion in denying access to these files. *See Ah Moo v. A.G. Becker Paribas, Inc.*, 857 F.2d 615, 619 (9th Cir. 1988). While plaintiffs demonstrate the relevance of statistics to their suit, they fail to show that discovery of the actual files was necessary. Focused discovery could have been employed. Plaintiffs accuse the defendants of inaccurate statistical conclusions, but they were free to utilize the statistics to draw their own conclusions. In addition, the plaintiffs had access to the same EEOC data from which the SAPD's expert compiled the statistics in question, and, when investigating a charge, the EEOC has "a broad right of access to relevant evidence." *University of Pa., Petitioner v. Equal Employment Opportunity Commission*, _ U.S. _, 110 S. Ct. 577, 583 (1990) (citing 42 U.S.C. § 2000e-8(a)). The SAPD's expert did not draw conclusions from the files themselves but from the EEOC data. Plaintiffs have not alleged that the EEOC data is biased or that they were denied access to this data. They fail to show prejudice from the denial of their full discovery request.

SUMMARY JUDGMENT ON PAY AND PROMOTION CLAIMS

[4] Plaintiffs claim that the SAPD's promotion policies, which require officers to be employed by the SAPD for a certain period of time before they can be eligible for promotions,

have a discriminatory impact on Hispanic officers hired laterally from other police departments.⁶ Plaintiffs challenge the district court's finding that these pay and promotion claims were governed by *LULAC*, 410 F. Supp. 873 (C.D. Cal. 1976). We agree that the district court misapplied *LULAC*.

[5] In *LULAC* the district court held that the City of Santa Ana engaged in discriminatory hiring practices that resulted in disproportionately few Mexican-American police or firemen. 410 F. Supp. at 911-12. The suit was brought in 1974 by a rejected Hispanic police applicant and by the League of United Latin American Citizens on behalf of its members. Finding unlawful discrimination, the district court also mandated that a preferential hiring order be instituted in future proceedings. *Id.* at 911. The district court in the instant case held that *LULAC* governed "all aspects of *lateral* transfers including credits, salary and classification." (emphasis added). *LULAC*, however, makes no mention of the City's policies on lateral hiring or potential discrimination that may result from those policies. *LULAC* only addresses hiring policies for new applicants to the police force. Moreover, the bilingual lateral transfer program began in 1974-75 following the initiation of the *LULAC* suit. Because the district court erroneously applied *LULAC* we reverse the district court's grant of summary judgment on this issue and remand for consideration of the plaintiffs' claim.

SUMMARY JUDGMENT ON OTHER DISPARATE IMPACT CLAIMS

Plaintiffs alleged that the defendants enforced City and department regulations in a racially and ethnically discriminatory fashion. On the basis of the defendants' statistical data, which did not reveal any discrimination, the district court

⁶Officers hired laterally from other police departments enter as "step C" employees as compared to rookie police officers who enter at "step A." Advancement to steps D and E is based on merit.

granted summary judgment to defendants on all generalized claims of disparate impact from disciplinary proceedings.

On appeal, plaintiffs challenge this summary judgment because they were denied equal access to personnel files which they claim would have allowed them to compile contradictory statistics and challenge defendants' evidence. As discussed previously, this claim has no merit.

DENIAL OF CLASS CERTIFICATION

[6] Sanchez, Torres, and Caro brought this action as individuals and as a class on behalf of all Spanish-surnamed individuals employed by the City as police officers, past, present and future, pursuant to Fed. R. Civ. P. 23(a), (b)(1), (b)(2). The district court denied class certification primarily upon a finding that the three no-longer-employed plaintiffs failed to meet the commonality and typicality requirements of Fed R. Civ. P. 23(a)(2) & (3). This ruling is correct.

On appeal plaintiffs argue that the denial of equal access to the personnel files prevented them from specifically alleging commonality or typicality. As previously noted, this claim has no merit and the district court did not abuse its discretion in refusing to certify this class. *Caldeira v. County of Kauai*, 866 F.2d 1175 (9th Cir.), *cert. denied*, ___ U.S. ___, 110 S. Ct. 69 (1989); *Probe v. State Teachers' Retirement Sys.*, 780 F.2d 776, 779 (9th Cir.), *cert. denied*, 476 U.S. 1170 (1986).

CARO'S PRE-TERMINATION CLAIMS

[7] Caro claims that the district court erred in granting summary judgment to defendants on his pre-termination claims based on a finding that the claims were barred by *res judicata*. We affirm the district court.

Following Caro's termination from the SAPD, he appealed the dismissal to the Personnel Board of the City of Santa Ana

seeking a reversal and reinstatement. The Personnel Board denied his requests, and Caro instituted an action in the California Superior Court seeking the same relief. He lost in the Superior Court and appealed to the Court of Appeals where he also lost. The Court of Appeals specifically found that Caro was afforded a full and fair hearing at the Personnel Board and that there was no bias or prejudice, racial or otherwise, involved in, or causing his discharge. The court also held that there were no due process violations. In response to the res judicata defense in the district court, Caro argued that the defendants conspired to obstruct justice and deter witnesses who might have testified on his behalf in violation of 42 U.S.C. § 1985(2).

It is well-established that where a federal constitutional claim is based on the same asserted wrong as a state action and the parties are the same, res judicata will bar the federal constitutional claim, whether or not it was asserted specifically in state court. 28 U.S.C. § 1738 (1982); *Trujillo v. County of Santa Clara*, 775 F.2d 1359, 1363 (9th Cir. 1985); *Scoggin v. Schrunk*, 522 F.2d 436, 437 (9th Cir. 1975), cert. denied, 423 U.S. 1066 (1976).

[8] In California, to whose law we must look for the applicable res judicata and collateral estoppel principles, *Punton v. City of Seattle*, 805 F.2d 1378, 1380 (9th Cir. 1988), cert. denied, 481 U.S. 1029 (1989), res judicata precludes a plaintiff from litigating a claim if the claim "relates to the same 'primary right' as a claim in a prior action, the prior judgment was final and on the merits, and the plaintiff was a party or in privity with the party in the prior action." *Trujillo*, 775 F.2d at 1366, (citing *Slater v. Blackwood*, 15 Cal.3d 791, 795, 543 P.2d 593, 594, 126 Cal. Rptr. 225, 226 (Cal. 1975)). Caro's claim was based upon the same due process rights, the state court judgment was final, and he was a party to the action. Moreover, he could have raised the specific allegation of conspiracy to obstruct justice in his state court proceedings.

Caro argues that he was not afforded a full and fair opportunity to litigate the claim in the state court and, accordingly, he should not be barred from litigating his pre-termination claims in federal court. We reject this contention.

Collateral estoppel does not apply when the party against whom it is asserted did not have a "full and fair opportunity" to present the case. *Kremer v. Chemical Constr.*, 456 U.S. 461, 480-81 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980). The Supreme Court has stated, however, that "state proceedings need do no more than satisfy the minimum procedural requirements of the Fourteenth Amendment's Due Process Clause in order to qualify for the full faith and credit guaranteed by federal law." *Kremer*, 456 U.S. at 481. Caro claims that Community Service Officer Christine Schuller was intimidated by various defendants and as a result would not testify on his behalf. He failed, however, to produce proof of that assertion. Moreover, Caro does not claim, and we do not find, that the California courts violated minimum standards of due process.

Caro also contends that issue and claim preclusion should not apply to claims brought under 42 U.S.C. § 1985(2). While the Supreme Court has not stated specifically that claim and issue preclusion principles apply to section 1985(2) conspiracy claims, it has held these principles applicable to Title VII and section 1983 suits. *See Migra v. Warren City School Dist. Bd of Ed.*, 465 U.S. 75 (1984) (state preclusion law applies to section 1983 claims); *Kremer*, 456 U.S. at 461 (claim and issue preclusion apply to Title VII actions). Moreover, in *Rutledge v. Ariz. Bd. of Regents*, 660 F.2d 1345 (9th Cir. 1981), *aff'd*, *Kush v. Rutledge*, 460 U.S. 719 (1983) we afforded full faith and credit to state judicial proceedings involving an athlete's claim that he was assaulted by his coach and that the team engaged in a cover-up of the incident in violation of section 1985(2). Likewise, we conclude that Caro's claim that justice was obstructed during the Personnel Board and state court proceedings is barred.

DIRECTED VERDICTS

Following the completion of the plaintiffs' oral presentation of evidence, defendants were granted directed verdicts on all remaining claims. Plaintiffs appeal the verdicts on the following claims: (1) The existence of a racially discriminatory atmosphere; (2) The unlawful retaliation against the plaintiffs for engaging in protected speech; (3) The discrimination and retaliation based on race and national origin; and (4) The conspiracies against plaintiffs due to their exercise of first amendment rights, their race and national origin, and defendants' obstruction of justice.

A. *Discriminatory Environment*

[9] Plaintiffs allege the existence of a racially discriminatory atmosphere at the SAPD in violation of 42 U.S.C. § 1981 and Title VII, 42 U.S.C. § 2000e. They claim that enough evidence was presented that a reasonable jury could have found the existence of a hostile work environment. . . . This is a mischaracterization of the record. We affirm judgment to the defendants.

Plaintiffs do not distinguish between their causes of action under section 1981 and Title VII. They contend that parallel claims under section 1981 and Title VII should be assessed by like standards. The Supreme Court has stated, however, that while there is a "necessary overlap" between these two statutes, section 1981 does not apply to post-contract formation conduct unrelated to an employee's right to enforce his or her contract. *Patterson v. McLean Credit Union*, _ U.S. _, 109 S. Ct. 2363, 2374-75 (1989). Title VII, on the other hand, applies to racial harassment in the course of employment. See *id.* at 2374; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 65-66 (1986) (Court discusses Title VII's application to sexual harassment). Because plaintiffs' hostile atmosphere claim does not involve specific allegations of a refusal to make a contract or the impairment of their ability to enforce

contract rights, it should be analyzed under Title VII. *Patterson*, 109 S. Ct. at 2374.⁷

In the district court's pretrial order, it was agreed that Title VII claims would not be tried by a jury. We have held that a jury trial need not be provided in Title VII cases. See *Slack v. Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975); cf. *Miller v. Fairchild Indus., Inc.*, 885 F.2d 498, 507 (9th Cir. 1989) (where plaintiff brings an equitable discrimination claim under Title VII and a legal claim under section 1981 based on the same facts, the trial judge must follow the jury's factual findings), *cert. denied*, ___ U.S. ___, 110 S. Ct. 1524 (1990). Accordingly, even if plaintiffs' discriminatory atmosphere claim is meritorious, we may not remand it for a jury determination.

In moving for a directed verdict, the defendants did not distinguish between plaintiffs' Title VII and 1981 claims. Likewise, in directing a verdict the district court did not make this distinction. The court found simply that "no reasonable person could find for the plaintiffs." In our review, however, we must make this distinction. We are not deciding whether the district court improperly took the issue away from the jury, but whether the district court erred in deciding the issue without hearing from the defense.

Federal Rule of Civil Procedure 41(b) allows the district judge presiding over a bench trial to decide the case following the close of the plaintiffs' case. In *Johnson v. United States Postal Service*, 756 F.2d 1461, 1464 (9th Cir. 1985), we held that a district court's factual findings made pursuant to Rule 41(b) should be reviewed under the clearly erroneous stan-

⁷Title VII of the Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin" 42 U.S.C. § 2000e-2(a)(1) (1988).

dard. We also held that ultimate findings under Rule 41(b) are mixed questions of law and fact and are reviewed de novo. *Id.* at 1465. While the defendants did not make a Rule 41(b) motion, their motion for a directed verdict at the close of plaintiffs' case on an issue that will ultimately be decided by the judge has the same effect. Accordingly, we adopt the same standard of review.

We cannot say that the district court's ultimate conclusion, that the plaintiffs failed to prove the existence of a discriminatory atmosphere, is incorrect as a matter of law. The "directed verdict" is affirmed.

B. First Amendment Claims

[10] Sanchez and Torres allege that they were unlawfully retaliated against for exercising their first amendment rights in violation of 42 U.S.C. § 1983. Our review of the record indicates that reasonable jurors could find retaliation on one or more of these claims. These claim are remanded for jury consideration of the potential liability of Chief Davis, Captains Hansen and Stebbens, and Lieutenant Williams to Sanchez,⁹ and the potential liability of Lieutenants Lewellen, Sterzer and Pitzer and Sergeant Bruns to Torres. The directed verdicts in favor of the City and the remaining defendants are affirmed. The specific instances testified to do not impose liability upon the City for the alleged retaliation by individual officers. Public entities are liable under section 1983 only when the constitutional violation occurs as a result of a policy or custom. *Monell v. New York City Dep't of Social Services*, 436 U.S. 658, 690-91 (1978); *City of St. Louis v. Praprotnik*, 485 U.S. 112, 122-23 (1988). Plaintiffs failed to prove the existence of such a policy or custom.

⁹In this appeal, we do not consider Sanchez's claims of retaliation for first amendment protected activity where the alleged retaliation is poor reviews and the removal of his merit pay. These claims are the same as those for which he received a jury verdict. *See Sanchez v. City of Santa Ana*, 915 F.2d 424, 426-28, 430-31 (9th Cir. 1990.)

"To make out a cause of action under section 1983, plaintiffs must plead that (1) the defendants acting under color of state law (2) deprived plaintiffs of rights secured by the Constitution or federal statutes." *Soranno's Gasco, Inc. v. Morgan*, 874 F.2d 1310, 1313-14 (9th Cir. 1989) (quoting *Gibson v. United States*, 781 F.2d 1334, 1338 (9th Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987)). A violation of section 1983 occurs where an employee is wrongfully retaliated against for speech protected by the first amendment. See *Connick v. Myers*, 461 U.S. 138 (1983); *Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977); *Pickering v. Board of Educ. of Township High School Dist. 205, Will County Ill.*, 391 U.S. 563 (1968); *Allen v. Scriber*, 812 F.2d 426 (9th Cir.), *amended*, 828 F.2d 1445 (1987).

To make a successful claim for wrongful retaliation under the first amendment and section 1983, the plaintiff must prove that: (1) the statement that brought on the retaliation is one of "public concern;" (2) the constitutionally protected expression is a "substantial" or "motivational" factor in the employer's adverse decision or conduct; and (3) the interests of the plaintiff/employee in commenting on the matter of public concern outweigh the state's interest in maintaining efficient public services. See *Allen*, 812 F.2d at 430-32. The defendants concede or do not contest that the incidents alleged by Sanchez and Torres are protected under the first amendment.

Sanchez and Torres testified to numerous instances that a reasonable jury could have found to be unconstitutional retaliation. Plaintiffs testified that the above identified defendants reacted adversely to the formation of the LPOA, the LPOA meeting with city personnel, the submission of the LPOA packet, the filing of EEOC complaints, the instigation of legal activity, Torres's press conference, and Sanchez's and Torres's public support of Caro following his discharge. Moreover, both Sanchez and Torres testified to being ostracized and victims of a "silent treatment" and of selective enforcement of the rules, and Torres claimed that he was penalized

in his interview for the ATL position and received poor reviews. These claims of first amendment retaliation are therefore remanded for submission to the jury. Sanchez and Torres are entitled to a jury determination of whether the first amendment has been violated, and by whom, and what damages, if any, would be required to repair any injuries caused by the alleged retaliation.

The evidence, however, does not support a claim that the SAPD's policy of bringing grievances to authorities in the SAPD before bringing them to the City or the public, was unreasonable as to Sanchez. The Supreme Court has held that a public employer can impose reasonable limitations on the manner that employer grievances are handled. *Connick*, 461 U.S. 138. "The problem . . . is to arrive at a balance between the interests of the [employee] as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting efficiency of the public service it performs through its employees." *Pickering*, 391 U.S. at 568.

In applying this test, we have held that a police department has a great interest in protecting itself from false and unfavorable publicity generated by its employees. *Allen*, 812 F.2d at 432; *Boyd v. Gain*, 558 F.2d 553, 554 (9th Cir. 1977) (court refuses to expunge reprimands from personnel files of officers who issued public statements about the police department's stop and frisk tactics), *cert. denied*, 434 U.S. 1087 (1978). The SAPD's policy of bringing grievances first through appropriate channels to authorities in the department before bringing them to the City or the public is reasonable and not arbitrary. There was no constitutional violation in requiring officers to communicate "through channels" before enlisting public opinion to their cause.

C. Discrimination/Retaliation

All three plaintiffs claim that substantial evidence was presented to sustain their allegations that the defendants violated sections 1981, 1983, and Title VII by retaliating against them because of their race. Their claims are founded on the fourteenth amendment's equal protection and due process clauses. This directed verdict is affirmed. Caro's claims are barred. Sanchez received favorable verdicts from the jury on his separate fourteenth amendment due process claim.⁹ There is no evidence to support Torres's claims; his grievances are best addressed under the first amendment analysis discussed previously.

D. Conspiracies

Plaintiffs claim that substantial evidence supports the inference of a single conspiracy managed and implemented by Chief Davis and Captain Hansen and involving all other defendants. They allege the same incidents of first amendment protected activities to support their conspiracy claim under section 1983. While we agree that enough evidence exists to reverse many of the directed verdicts, we do not find evidence to support a conspiracy claim under 42 U.S.C. § 1983.

Plaintiffs also claim that the defendants conspired to obstruct justice by deterring witnesses from testifying on behalf of Caro and by presenting false evidence at Caro's termination hearing depriving them of equal protection under the law in violation of 42 U.S.C. §§ 1985(2), 1986. This claim is meritless.

Section 1985 proscribes conspiracies to interfere with civil

⁹Our decision to vacate the award of \$500,000 for emotional distress injury because it is barred by principles of *res judicata*, see *Sanchez*, 915 F.2d at 431-32, does not affect our decision here.

rights. A claim brought under the first and second clauses of section 1985(2) requires a direct or indirect purpose to deprive any persons of the equal protection of the laws, or the equal privileges or immunities under the laws and a class race-based animus. See *Kush*, 460 U.S. 719; *Griffin v. Breckenridge*, 403 U.S. 88 (1971); *Bretz v. Kelman*, 773 F.2d 1026, 1028 (9th Cir. 1985) (en banc). To be actionable, the conspiracy must result in overt acts, done in furtherance of the conspiracy, that are both the cause in fact and proximate cause of plaintiffs' injuries. See *Arnold v. IBM*, 637 F.2d 1350, 1355 (9th Cir. 1981). A mere allegation of conspiracy without factual specificity is insufficient to support a claim. *Karim-Panahi v. Los Angeles Police Dept.*, 839 F.2d 621, 626 (9th Cir. 1988).

Plaintiffs allege the required class — Hispanic police officers — but their evidence of a conspiracy to obstruct justice aimed at the class is lacking. The basis of their claim is that state court proceedings were obstructed when defendants allegedly intimidated Officer Schuller from testifying on Caro's behalf. As noted above, this claim is barred by res judicata. Moreover, defendants have presented uncontroverted evidence that Schuller refused to testify of her own free will.

Plaintiffs also claim that Officer Fernandez was influenced to suppress evidence that Sergeant Dixon, who originally investigated Caro's complaint against Officer Bannon, was hostile to Caro. Plaintiffs presented evidence that Fernandez lied to the Personnel Board about his knowledge of Sergeants Dixon's potential bias. Even viewing this evidence in Caro's favor, however, one incident does not amount to substantial evidence of a conspiracy to obstruct justice directed at the class of Hispanic police officers.¹⁰

¹⁰Plaintiffs also allege that Chief Davis lied about the handling of the Caro matter when he testified in the state proceedings and that Lieutenant Williams inflated his state court testimony of Caro's excessive force charge. Neither of these incidents, however, evidence a conspiracy between two or more SAPD members.

Likewise, plaintiffs' claim against the individual defendants under section 1986 is meritless. "Section 1986 imposes liability on every person who knows of an impending violation of section 1985 but neglects or refuses to prevent the violation." *Karim-Panahi*, 839 F.2d at 626. A violation of section 1986 thus depends on the existence of a valid claim under 1985. *Id.*; *Trerice v. Pedersen*, 769 F.2d 1398, 1403 (9th Cir. 1985); *Mollnow v. Carlton*, 716 F.2d 627, 632 (9th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984).

INDIVIDUAL LIABILITY ON REMAND

[11] The individual defendants contend that they are immune from liability. We address their claim to guide the district court upon remand, and hold that the district court erred in ruling that the defendants were entitled to immunity because the law in this area was insufficiently clear. On remand, however, the court should also consider whether any of the defendants were performing discretionary functions and enjoyed qualified immunity for their actions on that basis.

Government officials performing discretionary functions enjoy qualified immunity from liability for civil damages as long as their conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Good faith qualified immunity attaches if the official's conduct is objectively reasonable "as measured by reference to clearly established law." *Id.* See also *Anderson v. Creighton*, 483 U.S. 635, 639-40 (1987) (the contours of the right must be sufficiently clear to a reasonable official so that the actor would have understood that what he was doing violated that right).

[12] The causes of action upon which we reverse the directed verdict involve particular rights that were clearly established at the time of the alleged incidents. See *Connick v. Myers*, 461 U.S. 138 (1983) ("for at least 15 years, it has

been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interests in freedom of expression."); *Gutierrez v. Municipal Ct. of Southeast Judicial Dist., Los Angeles County*, 838 F.2d 1031, 1050-51 (9th Cir. 1988) (governmental officials are not entitled to qualified immunity from a section 1981 or section 1983 action based on intentional discrimination), *vacated on mootness grounds*, _ U.S. _, 109 S. Ct. 1736 (1989); *Flores v. Pierce*, 617 F.2d 1386, 1392 (9th Cir.) ("[n]o official can in good faith impose discriminatory burdens on a person or group by reason of a racial or ethnic animus against them. The constitutional right to be free from such invidious discrimination is so well established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it."), *cert. denied*, 449 U.S. 875 (1980); *Rogers*, 454 F.2d at 238 (racially discriminatory atmosphere claim is actionable under Title VII).

ATTORNEY'S FEES

Upon post-trial motion, the Sergeant-defendants and the other nine individual defendants were awarded attorney's fees under 42 U.S.C. § 1988. Plaintiffs challenge these awards.

The district court found that the plaintiffs abused the legal process and dragged innocent individuals through the court system. Plaintiffs contend that, because many of the defendants' motions for summary judgment were denied, their claims have merit and attorney's fees were improperly awarded against them. Both sides claim too much from the record. Court time was wasted by both sides, some of it on groundless claims by plaintiffs, some of it by litigation-happy defense tactics. The meters in the law offices were running, but fee shifting was not warranted in this case.

Under section 1988 a court may award attorney's fees to a prevailing defendant if the court finds that the plaintiff's

action is "frivolous, unreasonable, or without foundation." *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978). See also *Hughes v. Rowe*, 449 U.S. 5, 14-16 (1980) (applying *Christiansburg* to 42 U.S.C. § 1983 case). In *Jensen v. Stangel* we held that denials of motions to dismiss and summary judgment may suggest that a plaintiff's claims are not without merit. 762 F.2d 815, 818 (9th Cir. 1985). While defendants are correct in noting that in *Jensen* we reversed the attorney's fees award primarily upon other grounds, *Jensen* nevertheless, provides guidance.

As in *Jensen*, two trial judges presided over different parts of these proceedings. By denying many of defendants' motions for summary judgment, Judge Hill apparently believed that parts of the plaintiffs' case had enough merit to proceed to the next stage of litigation. Judge Kenyon, after hearing 39 days of trial, found that most of the claims were not proven or were otherwise barred. Logic and fairness dictate that where two judges disagree, attorney's fees should not be awarded en gross for bringing a frivolous case.

Massive fee awards against plaintiffs who continue to trial are contrary to Congress' goal of "promoting vigorous prosecution of civil rights violations under Title VII and § 1983." *Miller v. Los Angeles County Bd. of Educ.*, 827 F.2d 617, 619 (9th Cir. 1987). We therefore reverse the district court's award of attorney's fees. To the extent that the City had to finance heavy defense costs, there is abundant evidence in this record that the City could have avoided much of the problem by employing a less confrontational approach to departmental grievances after having recently been through, and losing, the LULAC litigation.

We need not address whether the allocation of the burden of the fee award was an abuse of discretion because we hold that no award was warranted.

The district court abused its discretion in denying attorney's fees to Sanchez. A plaintiff in a civil rights suit is a prevailing party and is entitled to an award of attorney's fees if he "has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing suit.'" *Texas State Teachers Ass'n v. Garland Independent School Dist.*, _ U.S. _, 109 S. Ct. 1486, 1493 (1989). We remand to the district court to award reasonable attorney's fees, including fees on appeal, in connection with that part of the verdict affirmed in the City's companion appeal, *Sanchez v. City of Santa Ana*, 915 F.2d 424 (9th Cir. 1990). The district court shall determine the amount of fees that can be attributed to the part of Sanchez's appeal that was successful, and shall award reasonable attorney's fees and costs to the extent of Sanchez's success, both for the work in the district court and on appeal.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.



APPENDIX I



UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, <u>et al.</u>,	)	Case No.
	)	CV 791818IH
Plaintiffs,)	
	)	MINUTE
v.	)	ORDER
)	
CITY OF SANTA ANA, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

Hon. IRVING HILL, JUDGE

R.H. MAZZARELLA
Deputy Clerk

PROCEEDINGS: FURTHER HEARING:

Minute Order. April 20, 1981

Defendant's Motion for Summary

Judgement. Court hears oral argument.
Court grants motion in part. Defendant to
order transcript of proceedings. Counsel
stipulate that a minute order will suffice.

APPENDIX J

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, <u>et al.</u>,	)	Case No.
	)	CV 791818IH
Plaintiffs,)	
	)	REPORTER'S
v.	)	TRANSCRIPT
	)	ON RULING
CITY OF SANTA ANA, <u>et al.</u>,	)	ON MOTION
	)	FOR SUMMARY
Defendants.	)	JUDGMENT
<hr/>)

TRANSCRIPT OF RULING, GRANTING IN PART AND
DENYING IN PART DEFENDANTS' MOTION TO
DISMISS OR FOR SUMMARY JUDGMENT
(CONCLUSIONS OF LAW IN SUPPORT OF RULING)
(4/20/81)

THE COURT: Well, here is the decision
of the Court. The motion is granted and I
am making this declaration of law. Perhaps
it is more accurate to say it is granted in

part.

The Court rules that the res judicata doctrine is applicable. The Court further rules that under that doctrine, plaintiff is precluded from raising in this case any of the fact or legal matters that Plaintiff Caro could have raised in the state court proceeding.

Additionally, the Court rules that as to any post-termination acts, Mr. Caro is not precluded if, of course, those acts are found to be actionable. Those would not be barred.

Now, getting down to specific pretermination acts, since the determinant is whether the specific act could have been raised in the state court proceeding, that is simply not briefed as to the various acts that may be part of plaintiffs' contention.

So I want the question of what could

and what could not have been raised in the state court case to be fully briefed for the pretrial, and then I would like you to discuss with me at the time of the pretrial the desirability of making an in limine ruling on certain of those so as to conceivably limit the trial; but I am not making a final adjudication on any specific pretermination act as this time. I am only declaring the law.

Now, that is the end of today's ruling. I would like again to have a transcript in the file as a further explanation of what we have done today and for my own benefit later, as well as for the possible benefit later of the appellate court.

APPENDIX K

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, <u>et al.</u>,	)	Case No.
	)	CV 791818IH
Plaintiffs,)	
	)	MINUTE
v.	)	ORDER
)	
CITY OF SANTA ANA, <u>et al.</u> ,)	
)	
Defendants.)	
_____)	

Hon. IRVING HILL, JUDGE

R.H. MAZZARELLA
Deputy Clerk

PROCEEDINGS: FURTHER HEARING:

Minute Order. October 21, 1981

PROCEEDINGS: HEARING: Defendant's Motion
to Dismiss, Alternatively for Partial
Summary Judgment

Court hears oral argument.

Court ORDERS partial summary judgment granted. Court to prepare formal judgment.

Defendant to order and have filed a transcript of proceedings, said transcript to be designated as record in event of appeal from above ruling.

APPENDIX L

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, <u>et al.</u>,	)	Case No.
	)	CV 791818IH
Plaintiffs,)	
)	
v.	)	ORDER ON
	)	RULING ON
CITY OF SANTA ANA, <u>et al.</u>,	)	MOTION FOR
	)	SUMMARY
Defendants.	)	JUDGMENT
)	

ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANTS' MOTION TO DISMISS OR, IN THE
ALTERNATIVE, FOR PARTIAL SUMMARY JUDGMENT
(RES JUDICATA/COLLATERAL ESTOPPEL RE
PLAINTIFF CARO) (10/21/81)

There came before the Court on Monday,
October 19, 1981, Defendants' motion filed
September 28, 1981, denominated "Motion to
Dismiss or, in the Alternative, for Partial

Summary Judgment". Appearances were: for Plaintiffs, Meir J. Westreich, Esq.; for certain Defendants, Paul, Hastings, Janofsky & Walker by Howard C. Hay, Esq., and for other Defendants, Edward J. Cooper, Esq., City Attorney of Santa Ana by Harold R. Stokes, Deputy City Attorney.

The Court having considered the said motion together with the Points and Authorities, evidence and other documents filed in support thereof and in opposition thereto and having heard argument, IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. As to the portion of the motion seeking dismissal of Plaintiffs' prayer for compensatory and punitive damages against all Defendants based on Title VII, the motion is granted. Plaintiffs' counsel, in open court, concurred in the granting of said motion. The Court declares, as a matter of law, that no award of

compensatory or punitive damages may be made under Title VII.

2. As to the portion of the motion to dismiss (or to grant partial summary judgment) with regard to Plaintiffs' prayer for punitive damages against the City of Santa Ana for causes of action based upon 42 U.S.C. Secs. 1981, 1983, 1985 and 1986, the motion is granted. Plaintiffs' counsel, in open court, concurred in the granting of said motion. The Court declares as a matter of law that Plaintiffs' may not recover punitive damages against the Defendant City of Santa Ana on any of the aforesaid theories or causes of action.

3. As to the portion of the motion regarding the scope of permissible injunctive relief grantable in the event Plaintiffs or any of them should succeed, the motion is denied without prejudice to its reassertion during the trial of the

action or after its conclusion. The moving parties have not shown entitlement to such relief as a matter of law at this time and on the facts now before the Court.

4. As to the portion of the motion to dismiss (or for partial summary judgment) against Plaintiff Robert Caro based upon grounds of res judicata and/or collateral estoppel, the motion is granted as hereinafter set forth. The Court finds that there is no dispute of material fact and that Defendants are entitled to partial summary judgment against Plaintiff Robert Caro, as granted herein.

The action of Plaintiff Caro as against all Defendants is dismissed on all causes of action and theories advanced insofar as recovery is sought for acts occurring up to and including the date of Plaintiff Caro's discharge from the Santa Ana Police force on March 29, 1978.

Defendants and each of them shall have judgment against Plaintiff Caro as to any and all said actions and causes of action. The judgment does not dismiss the case of Plaintiff Caro in its entirety. There remains in the case claims of Plaintiff Caro, on whatever theory enunciated by him, as to discriminatory acts and wrongs committed by Defendants or any of them after March 29, 1978.

5. The Court's further findings of fact and conclusions of law, and a statement of its reason underlying this Order, are contained in a transcript of the proceedings in open court on October 19, 1981, which is filed in the records of the Court. In the event of an appeal from any of the decisions herein made, the appellant shall furnish said transcript to the Court of Appeal as part of the record on appeal.

6. The Clerk shall transmit a copy of

this Order by United States mail to counsel
for both sides.

DATED: October 21, 1981

SIGNATURE

IRVING HILL, Judge
United States District Court

APPENDIX M

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, <u>et al.</u>,	)	Case No.
	)	CV 791818KN
Plaintiffs,)	
)	
v.	)	DIRECTED
	)	VERDICT
CITY OF SANTA ANA, <u>et al.</u> ,)	
)	
Defendants.)	
)	

ORDER RE DIRECTED VERDICT (6/18/85)

Each of the Defendants having submitted a Motion for Directed Verdict and the Court having considered all of the papers filed by each of the parties pertaining thereto, and the Court having considered all of the evidence received or under submission in the matter hereby makes the following findings and orders:

Without weighing the credibility of the witnesses and otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable persons could reach. Further, the Court finds that Plaintiffs' pursuit of this case has by and large constituted a serious abuse of the judicial process.

Therefore, IT IS ORDERED AND ADJUDGED, except as to the issue previously decided by the summary Judgment, that the Motions for Directed Verdict brought by each of the Defendants as to each of the causes of action are GRANTED. The Defendants are directed to prepare a judgment in conformance with this order.

The Court shall hold under submission the reconsideration of its order granting Summary Judgment. Unless counsel advises otherwise, it is the Court's intention to proceed with the testimony as to the

damages aspect of that matter. The Court intends to hold a telephone conference in order to reschedule the remaining proceedings, particularly the return of the jury.

DATED: June 18, 1985

SIGNATURE

DAVID V. KENYON

UNITED STATES DISTRICT JUDGE



APPENDIX N

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, <u>et al.</u>,	)	Case No.
	)	CV 791818KN
Plaintiffs,)	
	)	ORDER RE RE-
v.	)	CONSIDERATION
	)	OF DIRECTED
CITY OF SANTA ANA, <u>et al.</u>,	)	VERDICT
)	
Defendants.)	
)	

ORDER RE RECONSIDERATION OF DIRECTED
VERDICT (9/17/85)

The Court, with respect to plaintiffs' motion for reconsideration of this Court's order granting a directed verdict, hereby issues this ORDER clarifying and formalizing the ruling from the bench on September 4, 1985 denying plaintiffs' motion. In addition, the Court, having

considered the papers filed with respect to defendants' motion to reconsider this Court's Order granting partial summary judgment, IT IS HEREBY ORDERED THAT Defendants' motion is GRANTED IN PART AND DENIED IN PART.

1. PLAINTIFFS' MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER GRANTING A DIRECTED VERDICT.

The Ninth Circuit has provided substantial guidance as to the relevant standards to be applied when ruling on a motion for a directed verdict. In Yeaman v. United States, 584 F.2d 322 (9th Cir. 1978), the court stated:

"Simply stated, it is whether the evidence is such that, without weighing the credibility of the witness or otherwise considering the weight of the evidence, there can be but one conclusion as to the verdict that reasonable men could have reached."

584 F.2d at 326. In Guillory v. County of

Orange, 731 F.2d 1379, 1382 (9th Cir. 1984), the court stated, "In considering a motion for a directed verdict, we view the evidence as a whole and we draw all possible inferences in favor of the non-moving party." This Court also notes the language in California Computer Products v. I.B.M., 613 F.2d 727, 735 (9th Cir. 1979) which states that in order to reverse a district court's determination to grant a directed verdict on a particular claim, there must be, after viewing the evidence in the light most favorable to the non-moving party, substantial evidence of every essential element of that claim.

Before applying these standards to the instant action, the Court finds that plaintiff's motion for reconsideration is not proper under Local Rule 7.16 No new factual evidence has been submitted nor is any attempt made to show why certain

arguments made now could not have been made upon this Court's consideration of defendants' motion for a directed verdict. Nevertheless, this Court has welcomed the opportunity to carefully read and review all the pleadings and evidence submitted by plaintiffs in this matter.

Having reviewed these matters, the Court finds that a directed verdict on all causes of action in this matter in favor of defendants is clearly warranted. First, there is no doubt that the defendant City of Santa Ana has always attempted in good faith to recruit and employ police officers from the Latino Community. It was and apparently still is the intention of the City's Police Department to make its recruiting program a success. Drawing all possible inferences in favor of plaintiffs, it is clear to this Court that no reasonable person could find from the

evidence presented that the Department engaged in any discriminatory actions, including any alleged conspiracy to discriminate against plaintiff. While there may have been some mistakes made during the course of plaintiffs' employment with the Department, there has been no evidence of discrimination by the Department which justifies this case being determined by a jury.

This Court is mindful that the anti-discrimination laws are designed to protect individuals from unlawful discrimination. These laws, however, are not designed to serve as one's sword to intimidate or harass individuals into conforming their conduct to a person's dictates. In this matter, the Court finds that plaintiff has attempted to use the law in such a manner. Apparently many officers, including defendants herein, were apprehensive over

associating with plaintiff Sanchez due to his readiness to initiate suit against those who didn't conform their conduct to his dictates or ideals.

The Court further emphasizes that no reasonable person, after reviewing all the evidence admitted and under submission, could find that any of the defendants acted with a racially discriminatory or racially retaliatory motive. Moreover, plaintiffs have failed to show any evidence that the acts alleged done by defendants were pursuant to a "custom and practice" of the Department.

The Court also finds that plaintiffs have not made an adequate evidentiary showing nor provided any case law supporting the claim that plaintiff Sanchez' First Amendment rights were violated. In that respect, it is clear to the Court that the actions taken by some of

the Defendants in reprimanding plaintiff for going outside the Department was completely warranted and justified. No reasonable jury could find differently.

The Supreme Court made clear in Connick v. Myers, ___U.S.____, 103 S.Ct. 1684 (1983), a public employer can impose reasonable limitations on the manner in which an employee's grievances are handled. In this case, plaintiff Sanchez suffered no loss of pay, status, or title as a consequence of the Department's response to plaintiff's going outside the Department to express his complaints. The Department and the individual defendants concerned simply acted to reinforce the necessity of requiring its officers to first proceed within the Department.

Plaintiffs have also asserted that there existed in the Department a "discriminatory atmosphere" against the

plaintiffs and Hispanic officers in general. However, having again considered all the evidence in this case, and drawing all inferences in plaintiffs' favor, the Court finds no reasonable person could find for plaintiffs on this claim.

In addition, plaintiffs have alleged that defendants in this action had conspired to obstruct justice. However, all the evidence presented overwhelmingly shows that defendants are entitled to a directed verdict on this claim as well.

Plaintiff has also alleged various theories of liability to avoid the immunity conferred upon the individual officers as set forth in Harlow v. Fitzgerald, 457 U.S. 800 (1982). As the Harlow Court stated, "We hold that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate

clearly established statutory or constitutional rights of which a reasonable person would have known." 457 U.S. at 818. No matter how the evidence is viewed, however, no reasonable person could come to the conclusion that any one of the individual officers in this matter violated clearly established law.

In Mitchell v. Forsyth, (Slip Opinion, June 19, 1985), the Court further explained that Harlow, supra, modified the qualified immunity doctrine such that many insubstantial claims could be resolved at summary judgment to avoid subjecting government officials either to the costs of trial or to the burdens of broad-reaching discovery. Id. at 14.

2. DEFENDANTS' MOTION FOR RECONSIDERATION OF THIS COURT'S ORDER GRANTING PARTIAL SUMMARY JUDGMENT.

Having considered both defendants'

motion to reconsider and the evidence presented at trial, the Court finds that with respect to the defendant City of Santa Ana, the defendants have failed to meet the requirements for reconsideration under Local Rule 7.16. Moreover, even assuming that there was a right to appeal to the City Manager beyond the Chief of Police, there is no sufficient showing that plaintiff had notice that such an appeal was available.

With respect to defendant Davis, however, this Court is firmly convinced that it was in error granting partial summary judgment. The actions taken by defendant Davis in this action cannot be reasonably found to be in violation of clearly established law. Thus, defendant Davis is entitled to the immunity protection as set forth in Harlow, supra, and Mitchell, supra, and should not be

required to endure the burden of trial. Consequently, the summary judgment against defendant Davis is vacated pursuant to Fed. R. Civ. Pro 60 (b).

It is further ORDERED THAT all interested counsel attend a status conference on September 23, 1985 at 11:00 A.M. to determine the remaining trial schedule in this matter.

IT IS SO ORDERED.

DATE: September 17, 1985

SIGNATURE

DAVID V. KENYON

UNITED STATES DISTRICT JUDGE

APPENDIX O

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JESSE J. SANCHEZ, <u>et al.</u>,	)	Case No.
	)	CV 791818KN
Plaintiffs,)	
)	
v.	)	FINAL
	)	JUDGMENT
CITY OF SANTA ANA, <u>et al.</u> ,)	
)	
Defendants.)	
)	

This action pursuant to 42 U.S.C. Sects. 1981, 1983, 1985 and 1986 having come on trial before a jury; the Court having directed a verdict and entered judgement as to certain Defendants: the court having entered judgement as to certain Defendants: the Court having entered judgement for Defendant City of

Santa Ana on all claims under 42 U.S.C.Sect. 2000(e); the Court having issued partial summary judgement as to one Plaintiff, and the jury having issued verdicts as to the damages thereon; the Court having made certain findings as to the prevailing parties and for apportionment for purposes of attorney's fees; and the Court having denied the motion of Defendant City of Santa Ana for a new trial and directed entry of a single final judgement:

IT IS HEREBY ADJUDGE AND DECREED as follows:

1. Each of the aforementioned orders, directed verdicts, jury verdicts, and prevailing party and attorney fees apportionment determinations, as well as all previously entered findings, orders and judgements herein, are subsumed into this Final Judgement as though fully set forth

herein;

2. Final Judgement is entered for Defendants DAVIS, HANSEN, BOTT, DRUMMOND, WILLIAMS, STERZER, STEBBINS, PITZER, BRUNS, McCLAIN, LEWELLEN, DIXON, COLLINS, LANNERS, FAUST, McDANIEL and DITTUS on all claims as to all Plaintiffs;

3. Final Judgement is entered for Defendant City of Santa Ana on all claims as to Plaintiff's CARO and TORRES:

4. Final Judgement is entered for Plaintiff SANCHEZ on his due process claim pursuant to 42 U.S.C. Sect. 1983 as to Defendant City of Santa Ana, in the amounts of the jury verdicts: \$400,000.00 for lost income and \$500,000.00 for compensatory damage for a total of \$900.000; Plaintiff SANCHEZ takes nothing on his remaining claims as to Defendant City of Santa Ana;

5. The fee award determinations and apportionments the reasonableness of

attorneys fees and costs, the actual rates of compensation of attorneys fees, and matters related thereto, are reserved for further proceedings, but shall not stay entry of this final judgement. Fed. R. Civ. Proc. 58, Local Rule, 16.10.

Dated: July 22, 1986

SIGNATURE

DAVID V. KENYON

JUDGE OF THE DISTRICT COURT

APPENDIX P

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CALIFORNIA GOVERNMENT CODE

3302. Political Activity; Membership in School Board.

(a) Except as otherwise provided by law, or whenever on duty or in uniform, no public safety officer shall be prohibited from engaging, or be coerced or required to engage, in political activity.

(b) No public safety officer shall be prohibited from election to, or serving as a member of, the governing board of a school district.



APPENDIX Q



CALIFORNIA GOVERNMENT CODE

3304. Lawful Exercise of Rights; Insubordination; Administrative Appeal

(a) No public safety officer shall be subjected to punitive action, or denied promotion, or be threatened with any such treatment, because of the lawful exercise of the rights granted under this chapter, or the exercise of any rights under any existing administrative grievance procedure.

Nothing in this section shall preclude a head of an agency from ordering a public safety officer to cooperate with other agencies involved with criminal investigations. If an officer fails to comply with such an order, the agency may officially charge him with insubordination.

(b) No punitive action, nor denial of promotion on grounds other than merit, shall be undertaken by any public agency without providing the public safety officer with an opportunity for administrative appeal.

